No. 15131

In the

United States Court of Appeals

For the Ninth Circuit

STATES STEAMSHIP COMPANY, a corporation, *Appellant*,

v.

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees*.

ATLANTIC MUTUAL INSURANCE COMPANY, *Appellant*,

v.

STATES STEAMSHIP COMPANY, a corporation, UNITED STATES OF AMERICA and THE DOMINION OF CANADA, *Appellees*.

PACIFIC NATIONAL FIRE INSURANCE COMPANY, *Appellant*,

v.

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UNITED STATES OF AMERICA, *Appellant*,

v.

STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees*.

THE DOMINION OF CANADA, *Appellant*,

v.

STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE UNITED STATES OF AMERICA, *Appellees*.

ANSWERING BRIEF OF APPELLEES

Atlantic Mutual Insurance Company, Pacific National Fire Insurance Company and The Dominion of Canada.

Appeals from the United States District Court for the District of Oregon

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DAILY JOURNAL OF COMMERCE

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JURISDICTION

This proceeding was commenced by the filing of a petition for exoneration from or limitation of liability by States Steamship Company as corporate owner of the SS PENNSYLVANIA. The petition was filed in the United States District Court for the District of Oregon.

The jurisdiction of the District Court was acquired under Rules 51-55 of the United States Supreme Court Admiralty Rules.

The jurisdiction of the this court was acquired under 62 Stat. 929, 28 U.S.C.A. § 1292.

INTRODUCTION

The opening brief filed by appellants, Atlantic Mutual Insurance Company, Pacific National Fire Insurance Company and The Dominion of Canada, relates solely to the subject of limitation of liability and the clear error of the trial court in failing to find that the unseaworthy condition of the SS PENNSYLVANIA at the inception of her fatal voyage was within the privity or knowledge of States Steamship Company, within the

meaning of the Limitation of Liability Act, 46 USCA § 183.

In this answering brief, appellees, Atlantic Mutual Insurance Company, Pacific National Fire Insurance Company and The Dominion of Canada, will show that the record in this proceeding contains satisfactory and substantial evidence supporting the findings and conclusions of the trial court to the effect that the storm in which the SS PENNSYLVANIA was lost was not of such magnitude as to constitute a peril of the sea; the proximate cause of the sinking of the SS PENNSYLVANIA was her own unseaworthiness; the failure and difficulties outlined in the vessel's radio messages were factors of unseaworthiness and the contributory factors proximately causing the sinking; the vessel was unseaworthy by reason of these factors at the inception of her voyage, and petitioner failed to exercise due diligence to make the vessel seaworthy.

To simplify identification, States Steamship Company shall hereinafter be referred to as "petitioner".

ANSWER TO PETITIONER STATES STEAMSHIP COMPANY'S CONCISE STATEMENT OF THE CASE

At pages 3 and 4 of its opening brief, petitioner refers to a written memorandum opinion of the trial

court, dated November 17, 1955. This opinion is also referred to in subsequent portions of the petitioner's brief and is set forth in the appendix to petitioner's brief.

In making reference to the above opinion, petitioner completely ignores the fact that the trial court, in hearing argument upon settlement of the findings of fact and conclusions of law, refused to adhere to his written memorandum opinion and after full argument of all counsel entered his findings of fact and conclusions of law (Tr 72).

In its effort to derive comfort from the memorandum opinion, petitioner ignores the recent ruling of this court in *KISKA-MAYFLOWER*, 205 F2d 262 (9th Cir., 1953), 1953 AMC 1021, to the effect that on appeal from the interlocutory decree of the District Court in an admiralty suit, the Court of Appeals must consider the formal findings of fact and conclusions of law entered in the District Court by the trial judge as distinguished from the trial judge's statements in his opinion. The rule was stated by this court as follows:

> "The formal findings of fact and conclusions of law made by the trial judge and entered in the District Court is the requisite instrument for consideration of this appeal in this court."

Any reference throughout appellant's brief to the memorandum opinion of the trial judge should, accordingly, be completely disregarded.

At page 4 of its brief, petitioner, while attempting to review the findings of fact entered by the trial court, asserts that while such findings hold that the vessel was unseaworthy at the inception of her voyage, they do not state what that unseaworthiness was. This contention is amplified in subsequent portions of petitioner's brief, particularly at pages 61 through 64 of petitioner's argument that the vessel was seaworthy. A review of the findings of the trial court will readily disclose that these findings clearly specify the nature of the unseaworthiness of the SS PENNSYLVANIA at the inception of her voyage, as we shall develop subsequently in argument.

Petitioner includes as a question involved in this appeal an issue as to the existence of latent defects in the SS PENNSYLVANIA not discoverable by due diligence. This contention was not raised in the petition for exoneration from or limitation of liability and is now raised by petitioner for the first time in this proceeding. In argument, we shall show that the so-called "latent defect" doctrine is not an issue in this appeal and certainly is not available as a defense to liability in this proceeding.

QUESTIONS PRESENTED

Does the evidence of record in this proceeding provide reasonable support for Findings of Fact Nos. III, IV, V and VI and Conclusion of Law No. II made by the trial judge and entered in the District Court? For convenient reference, the foregoing findings and conclusion are set forth in full context, as follows (Tr 72):

Finding of Fact No. III

> "The storm, which had been designated as the PENNSYLVANIA storm, in which the vessel sank was not of such magnitude as to constitute a peril of the sea, the weather encountered, if not actually anticipated, certainly was of a kind reasonably to have been expected in January on trans-Pacific voyages over the Great Circle route, and there was nothing catastrophic about the storm as all other vessels in the area withstood the wind and the seas, the sole and proximate cause of the sinking of the PENNSYLVANIA being her own unseaworthiness."

Finding of Fact No. IV

> "The contributory factors responsible for the sinking of the SS PENNSYLVANIA are found in the radiograms sent from the vessel immediately prior to her sinking, stating that the vessel sustained a crack down the port side between frames 93 and 94; that the crack started in the sheer strake and ran down about 14 feet; that sea water entered the engine room of the vessel through this crack; that the vessel sustained a failure or breakdown of its steer-

ing systems and for a time the vessel was completely unable to steer by any method in heavy seas then existing and that if they could not fix the steering gear that they would need immediate assistance; that the vessel was taking water in the No. 1 hold; that the deck cargo on the forward deck came adrift and was taking off the tarpaulins on the forward hatches, and that the No. 2 hatch was open and full of water."

Finding of Fact No. V

"That the foregoing faults, failures, breakdowns and defects set forth in the preceeding finding IV, together with the crack sensitiveness of the vessel to extreme cold weather by reason of a former 22-foot crack in her deck occurring on her previous Voyage V, which crack was fully repaired, were factors of unseaworthiness culminating from the unseaworthy condition of the vessel at the inception of her voyage which prevented her from meeting the expected and to be anticipated weather conditions and proximately caused her sinking, with the total loss of the vessel, with all of her crew and personnel aboard and all of her cargo."

Finding of Fact No. VI

"That the evidence is insufficient to show that petitioner used the due diligence required by law to make the vessel seaworthy at the inception of her voyage, and the Court finds that the petitioner did not use the due diligence required by law to make the vessel seaworthy and to entitle it to exoneration from liability."

Conclusions of Law No. II

"That the petitioner has failed to prove due diligence to make the SS PENNSYLVANIA seaworthy at the inception of the voyage upon which she sank by reason of her unseaworthiness and is not entitled to exoneration from liability to the cargo claimants."

SUMMARY OF ARGUMENT

I

The finding of the trial court that the storm encountered by the SS PENNSYLVANIA did not constitute a peril of the sea and was not the proximate cause of the sinking of the vessel is amply supported by the evidence and should not be disturbed on this appeal.

A. Evidence that the Storm Was Not a Peril of the Sea.

B. Exceptions to Argument of Petitioner on Evidence Relating to the PENNSYLVANIA Storm.

C. Law as to the Peril of the Sea and Statutory Exceptions to Liability under the Carriage of Goods by Sea Act of 1936 and the Canadian Water Carriage of Goods Act of 1936.

II

The evidence provides ample support for the findings of the trial court that the proximate cause of the sinking of the SS PENNSYLVANIA was her own unseaworthiness; that the failures and difficulties outlined in the vessel's radio

messages were factors of unseaworthiness, and the contributory factors proximately causing the sinking; that the vessel was unseaworthy by reason of these factors at the inception of her voyage (see Findings of Fact Nos. IV and V; petitioner's Specification of Errors Nos. II and V) and that petitioner failed to exercise due diligence to make the vessel seaworthy (see Finding of Fact No. VI and petitioner's Specification of Errors Nos. III and V).

A. Presumption of Unseaworthiness.

B. Evidence of a Defective Hull Structure.

C. Evidence of a Defective Steering System.

D. Evidence of the Unseaworthy Condition of the Forward Hatches, the Insecure Carriage and Stowage of Forward Deck Cargo.

III

Petitioner's defense of latent defects.

IV

Petitioner's defense of error in navigation.

V

The privity of petitioner in the failure to exercise due diligence is clearly demonstrated and proved by the testimony of record.

ARGUMENT

I

The finding of the trial court that the storm encountered by the SS PENNSYLVANIA did not constitute a peril of the sea and was not the proximate cause of the sinking of the vessel is amply supported by the evidence and should not be disturbed on this appeal.

A. Evidence that the Storm Was Not a Peril of the Sea.

The trial court expressly found that the storm was not a peril of the sea after hearing extensive testimony concerning the storm in which the SS PENNSYLVANIA sank. Although some of the testimony of these witnesses was conflicting, substantial evidence was received to support the finding and establish that the storm was neither unprecedented or catastrophic, but was on the contrary of a character to be anticipated in the Gulf of Alaska and on the Great Circle Route to the Orient in the winter season. Much of the testimony on this point was provided by experienced master mariners who were present and participants in the very storm in question. We summarize their testimony on the following pages under headings for the names of the vessels upon which they were serving.

CANADIAN WEATHERSHIP STONETOWN

At the time this vessel received the SOS transmitted by the SS PENNSYLVANIA it was located at its desig-

nated Weather Station, where it performed the duty of taking periodic weather observations and reporting them to Vancouver, British Columbia, for redistribution. In addition to its regular crew, this vessel carried a staff of four meteorologists and nine wireless officers (Tr 1946). It was commanded by John W. McMunagle, master mariner with 35 years of sea experience (Tr 1939-1940). Captain McMunagle was a highly qualified witness with experience as a master mariner on all oceans. During recent years he had become particularly familiar with the weather and sea conditions in the Gulf of Alaska during his patrols at the Ocean Station.

Although the STONETOWN was approximately 205 miles from the position reported by the SS PENNSYLVANIA in her SOS (Tr 1970), the STONETOWN was the first ship to reach the scene of the rescue-search area (Tr 1972), where it took command of "on-the-scene search activities" (Tr 1973) at speeds which Captain McMunagle described as "various speeds from half speed up" (Tr 1974) on various courses (Tr 1975) (Exh 146(8)).

It is highly significant that no damage whatsoever was sustained to the STONETOWN, after it departed from its weather station on the morning of January 9, until it first reported damage on January 14. This is all the more significant when it is recalled that the

STONETOWN was proceeding on zig-zag courses and varying speeds during this period of 4 to 5 days while rescue-search activities were in progress. The nature of this operation of the vessel produced the most exacting strain on the structure of the STONETOWN (Tr 1975). Nevertheless, the STONETOWN required no assistance from other vessels and was able to return to port under her own power (Tr 1975).

The STONETOWN arrived at the position of the SS PENNSYLVANIA as reported in her SOS of January 10, 1952 after steaming for 21¾ hours from her position at the Ocean Station (Tr 1971). The STONETOWN continued in full active participation in the search and rescue efforts until the morning of January 15 (Tr 1978).

In describing the storm, Captain McMunagle testified:

> "Q Captain, what would you say would be the usual and expected weather for the vicinity of Weather Station Papa in the winter months?
>
> A Well, you can expect very rough seas and gales of varying degrees of intensity practically throughout the winter.
>
> Q Was there anything unusual or unanticipated about the weather conditions that existed in the month of January, 1952, in the vicinity of Weather Station Papa?

A No.

. . .

Q After you had received the damage on either the 13th or 14th of January—I don't recall your testimony exactly on that—and you were returning to your home port, were you unduly apprehensive as to whether or not your ship would make it?

A No, I was not.

Q Captain, from your experience on a cargo vessel and from your experience with weather conditions in the vicinity of Weather Station Papa, do you feel that a seaworthy loaded cargo vessel would have experienced any difficulty in storms as you observed them, say from the 5th of January until the 14th of January, 1952?

A No, I don't think so." (Tr 1993-1995)

and in response to a question on cross-examination by petitioner testified:

"Q I am asking you pointblank, Captain—you have been on that station two years—have you ever seen a worse sea condition and a worse storm than is described in this log on January 8?

A I have seen as bad. I would not say I have seen worse. I have seen as bad.

Q Have you ever seen it continue as long as this storm did?

A Yes, I have.

Q When you say you have seen them as bad, how many times have you seen any storm as bad as this?

A A storm and possibly the same conditions three or four times on the station since I have been on it." (Tr 2005)

and

"Q Now, Captain, having in mind the conditions of weather and sea and wind that you have heretofore testified to as having been encountered during this period of patrol 5, I will ask you to give us your opinion as to whether or not the STONETOWN would have been able to continue on patrol for the full duration of patrol but for the search activities?

A She would have been." (Tr 2042-2043)

Q "Would your summary be, then, as to your experience that on every wintertime patrol you have encountered storms of this severity?

THE WITNESS: That is correct." (Tr 2047)

JAPANESE VESSEL KOTOH MARU

Seiichi Mori was Master of this vessel, which was some distance west of the SS PENNSYLVANIA. He testified in his deposition (Exh 123):

"Q Captain, was there anything unusual that you recall about the weather and sea conditions that you encountered during this period from January 7th through January 9th?

A Yes, big storm.

Q Big storm?

A Yes, but in winter times, North Pacific Ocean, sometimes we expect the same kind of storm then.

Q Was there anything unprecedented about the storm that you encountered during this period, for this time of the year?" (Tr 1512)

Q "Nothing unusual?

THE WITNESS: (Through Interpreter) Not unusual." (Tr 1512)

and

"Q In your opinion, Captain, would a fully loaded vessel, a seaworthy vessel fully loaded, be able to live through weather and wind and seas such as you encountered on January 7th through January 9th?

. . .

THE INTERPRETER: He thinks a seaworthy boat, fully loaded, could stand for such kind of weather." (Tr 1518-1519)

"Q Will you compare the severity of the storm that you encountered and logged on January 8th with the storm that was encountered on April 24th. Compare the two, please, as to severity.

A All the same, I think, but . . .

. . .

THE INTERPRETER: So he thinks it all must be the same sea condition.

Q The severity about the same?

A Yes." (Tr 1520-1521)

"Q On voyages that you made on other ships across the North Pacific before the war, did you ever encounter weather of the same severity, weather as bad as on this voyage in January, 1952?

A Sometimes." (Tr 1545)

LIBERTY SHIP CYGNET III

This vessel was a Liberty ship commanded by Dennis Brown who had been a Master of only 5 ships and at the time of trial had been ashore for approximately 17 months.

In his opening statement, counsel for petitioner represented to the Court that the Liberty class ship was, as compared to the Victory class ship, inferior in design, strength and power, stating that the Victory ship was "a different type ship, a better ship, a stronger ship in every way, a more powerful and better designed ship" (Tr 105-106). Despite these inferior features, the CYGNET III was seaworthy. She did not have a raised forecastle head, as is the case of a Victory class vessel, and consequently she was more prone to take seas over the bow than a Victory ship (Tr 1664-1665). Captain Brown sought to emphasize the severity of the storm by describing how seas were shipping over the bow and sides, how the vessel pitched and labored and rolled. However, the consistent testimony of experienced witnesses in this case is to the effect that such sea conditions and movements of the vessel were not uncommon in storms in the North Pacific, nor was it uncommon to heave to during a storm.

Reference to the logs of the SS PENNSYLVANIA (Exhs 40, 41, 42, 43 and 44), will readily disclose that

pitching, laboring, rolling and taking seas over the bow or sides, is not indicative of unusual weather. The logs of the SS PENNSYLVANIA bear notations that the vessel, from Voyages 1 to 5, pitched 46 times, rolled 29 times and shipped seas over the bow and sides 44 times.

The storm could not have been as severe as Captain Brown represented in his testimony, in view of the fact that he was able to increase the speed of his engines and change course to enable the CYGNET III to go to the rescue of the SS PENNSYLVANIA. The CYGNET III thereafter participated for a number of days in the rescue-search activities on various courses and at various speeds throughout the complete duration of the storm.

Captain Brown had command of a Liberty type ship, which was acknowledged to be inferior in construction, design and power to the Victory type. Notwithstanding this difference in the quality of his vessel he was only "a little bit worried about it" (Tr 1643).

Petitioner would make much of certain items of damage sustained to the CYGNET III in the storm. Again, however, due consideration must be given to the fact that this vessel spent five days in intensive search operations. During this time it received some heavy weather damage, but such damage was not so great as to require the vessel to terminate its search operations or to return to a United States port for repairs (Tr

1658). In fact, the vessel continued on to Japan where it was necessary to repair only a portion of the heavy weather damage.

In its opening brief, petitioner has endeavored to emphasize items of heavy weather damage sustained by certain other vessels in the PENNSYLVANIA storm. We have pointed out that such damage was in no way disabling, did not affect the respective voyages of the vessels concerned and was sustained primarily by each vessel in undertaking the abnormal courses and speeds involved in the rescue-search operations during the height of the storm and for its full duration. However, an examination of the testimony will prove beyond any question that heavy weather damage is the usual, and not unusual, result of weather encountered in the North Pacific winter season.

Even Captain Brown will admit that heavy weather is to be anticipated:

> ". . . You sometimes get heavy weather damage, but you just don't expect it all the time." (Tr 1660)

The strongest proof of anticipated heavy weather damage is contained in the logs of the SS PENNSYLVANIA for Voyages 1 to 5, inclusive (Exhs 40 to 44, inclusive). On Voyage 1 the propeller was torn off the

poop deck by heavy weather. On Voyage 2, a reel of spring wire had broken off, cutting through four tarpaulins on No. 2 hatch. These incidents were described by Mr. Vallet as ordinary heavy weather damage (Tr 189).

In fact, heavy weather damage is sustained on practically all voyages (Tr 189). For example, on Voyage 4 of the SS PENNSYLVANIA an acid cargo box was torn adrift and damaged the forward starboard boom rest but this incident was described by Mr. Vallet (Tr 190) as an ". . . ordinary routine instance that happens on any transpacific voyage."

The deck log for Voyage 5 of the SS PENNSYLVANIA contains an entry that the deck load fore and aft was shifting and the decks were awash. However, Mr. Vallet says this (Tr 191):

". . . happens practically on all voyages."

And Mr. Vallet further testified:

"Q Then you have told us yesterday about heavy weather damage that you encountered because of storm conditions. Major heavy weather damage is not unusual, is it?

A Not unusual in the wintertime, no." (Tr 231-232)

In determining whether petitioner has carried the burden of proof in establishing that the storm was of a nature to constitute a peril of the sea, we should first examine the testimony of the personnel who were in the storm. Although no one aboard the SS PENNSYLVANIA survived, we have the benefit of radio messages from the SS PENNSYLVANIA during the storm in which she foundered. The first message is contained in the weather report of the SS PENNSYLVANIA where the Master describes the seas as being mountainous (Exh 97). This term is used by mariners to indicate waves at their highest but whether mountainous seas are unusual or unanticipated can best be answered by referring to the deck logs of the SS PENNSYLVANIA which indicate that in the *eleven months preceding her sinking*, mountainous waves were recorded during Voyage 1 and Voyage 5, in the latter voyage on two separate occasions.

The storm must have been abating after the initial weather report of mountainous seas, because we know that at 1400Z January 9, 1952, the time of the origin of the first radio message from the SS PENNSYLVANIA advising of trouble, the seas were reported as very high westerly seas. An examination of the logs of the SS PENNSYLVANIA discloses that very high seas are not uncommon, for the vessel encountered seas of this de-

scription on six occasions during the eleven months of her operation by States Steamship Company.

It should be noted at this point that the U. S. Hydrographic Scale for seamen's description of seas specifies "very high" seas at approximately 20 to 40 feet and "mountainous seas" as approximately 40 feet and over.

The wind at the time of the SS PENNSYLVANIA's first message reporting the hull fracture on the port side was of Force 9 and no one in this proceeding has suggested that a Force 9 wind, Beaufort Scale, is anything unusual, unforeseeable or extraordinary for the North Pacific in the winter season. Actually, as we shall hereafter note, winds of Force 10 or greater were recorded on 133 occasions in the four winter months of November, December, January and February of 1948-49 to 1953-54 (Tr 2176; 2268). From the reports of the SS PENNSYLVANIA itself, it cannot be said that there is any evidence of an unusual storm.

B. Exceptions to Argument of Petitioner on Evidence Relating to the PENNSYLVANIA Storm.

Before reviewing authorities which, when applied to the evidence in this proceeding, eliminate the PENNSYLVANIA storm as an exception to liability under the Carriage of Goods by Sea Act, we must invite attention to a number of representations made by petitioner which particularly are without foundation in evidence.

Under the subheading "STONETOWN", commencing at page 27 of its brief, petitioner ascribes to Captain McMunagle testimony to the effect that if the SS PENNSYLVANIA was nearer than the STONETOWN to the center of the storm, her conditions would be worse (petitioner's brief, p 29). Petitioner then flatly asserts that the SS PENNSYLVANIA *was* "nearer the center, as we shall show." The subsequent showing made by petitioner in this respect appears on pages 51-52 of its brief, where petitioner claims that a plotting on synoptic charts of the position of the various ships on January 9, 1952, will disclose that the SS PENNSYLVANIA was nearer the "eye" of the storm.

The testimony of Captain McMunagle in response to the question of counsel for petitioner relating to the "center of the storm" is entirely without meaning since the expression "center of the storm" was never defined for his benefit. What does petitioner mean by the "center of the storm"? This abstract and technical term is not defined in the entire record of this proceeding. Insofar as the SS PENNSYLVANIA and other ships in the storm area are concerned does it mean the actual geometric center of the storm, or the particular area of the storm in which the most intense weather and sea conditions prevailed? It is obvious that the expression can have two meanings in this respect and no defi-

nition can be found in the record of this case. Captain McMunagle frankly testified that he did not know where the center of the storm was "because we don't go into that at a time like this, it was over such a large area" (Tr 2043). Probably Captain McMunagle applied the term "center of the storm" to that area embracing the most intensive weather and sea conditions.

Petitioner's meteorologist Danielson designated the center of the storm, during a period from 1800Z January 8, 1952 until 0000Z January 10, 1952 on Exhibit 101. He drew a circle on this exhibit showing a radius of about 2° or approximately 120 nautical miles, and placed the center at about latitude 50° North, longitude 138° West (Tr 1303-1304). The entire area "affected" by the storm was larger than the above designated center of the storm and extended *beyond* the Ocean Station (Tr 1304-1305), and Professor Rattray testified that 17 ships, including the SS PENNSYLVANIA, were in "the area of the storm" (Tr 1594). Danielson testified that the most extreme weather conditions in the case of this particular storm were not in the storm center as above described on Exhibit 101, but would be "further south" (Tr 1402). This testimony is difficult to reconcile with that of petitioner's oceanographer Rattray who testified, from his armchair examination of synoptic charts, that on January 10, 1952 winds were

at a higher velocity west and to the northwest of the Ocean Station (Tr 1604). (The center of the 210 mile grid of the Ocean Station is latitude 50° North, longitude 145° West and the position of the STONETOWN at the time she received the SS PENNSYLVANIA's SOS was latitude 50° 27′ North, longitude 146° 30′ West, 205 miles southwest of the SS PENNSYLVANIA, bearing 258° true (Tr 1964; 1966).

In view of the confused status of the record as to the meaning and significance of the term "center of the storm", and its location in the instant case, it is not surprising that petitioner has made no reference in its opening brief to the testimony of its meteorologist and oceanographer in this respect.

Petitioner's assertion on page 51 of its brief that the SS PENNSYLVANIA was nearest the "eye" of the storm has utterly no foundation in evidence. Nowhere in the entire record is the expression "eye of the storm" employed or defined and there is, of course, no testimony as to sea and weather conditions prevailing in the "eye" of this particular storm. If "eye" of the storm means the geometric center, Danielson and Professor Rattray each testified that the conditions would be worse elsewhere than the center of the storm, although testimony of these two witnesses is in conflict on the portion of the storm area which had the most intense conditions. Al-

though the testimony adduced by petitioner as to the meaning and significance of the expression "center of the storm" is confusing and conflicting, it does establish that the portion of the storm in which the most intense conditions prevailed covered a very wide area, and under the testimony of Professor Rattray, 17 ships, including the SS PENNSYLVANIA, were in this storm area.

C. Law as to the Peril of the Sea and Statutory Exceptions to Liability under the Carriage of Goods by Sea Act of 1936 and the Canadian Water Carriage of Goods Act of 1936.

In presenting authorities on this issue, petitioner has overlooked a basic principle well established under the Carriage of Goods by Sea Act of 1936 and its Canadian equivalent, which eliminates the PENNSYLVANIA storm as a peril of the sea, without regard to any question as to its severity.

It is uniformly held by American and Canadian decisions that aside from any question as to intensity and violence of a given storm, the shipowner has the burden of proving that the storm was the sole, proximate cause of the vessel's loss. The storm is not a statutory exception to liability, although of catastrophic magnitude, if it concurred with any unseaworthiness of the vessel proximately causing the loss, and in no event does the storm constitute a defense if the carrier

has failed to prove the exercise of due diligence to make the ship seaworthy. The rule has been stated as follows:

> "The respondent is liable for the damage to the manganese ore caused by the overflowing oil. The carrier has the burden of showing that the loss was due to one of the excepted causes. Further, the carrier has the burden to show that it used due diligence to make the vessel seaworthy for the voyage. . . . If it appears that there may have been several concurring causes of the damage, the burden is on the carrier to show that it was due to one of the causes excepted under the Carriage of Goods by Sea Act. And if it is shown that more than one cause was an effective and proximate cause of the damage and that one of the causes was the unseaworthiness of the vessel, the fact that the other cause was an excepted cause under the Act does not relieve the carrier from liability. If unseaworthiness resulting from the carrier's failure to exercise due diligence to make the vessel seaworthy concurs with negligent management of the vessel by the officers, the carrier is liable . . ." *Union Carbide & Carbon Corp. v. The WALTER RALEIGH*, et al, 109 F Supp 781, at p 793, (D.C.S.D.N.Y., 1951); affirmed 200 F2d 908 (2nd Cir., 1953)

The above principle was recognized and applied by this court under the Harter Act in *The INDIEN*, 71 F2d 752 (9th Cir., 1934). See also *The MANCHURIA*, 34 F2d 843 (9th Cir., 1929), where Judge Wilbur stated, at p 845:

> "In view of these circumstances, it is clear that the storm was of such violence and at such a time

as to constitute a peril of the sea, exempting the shipowners from liability in the event that the ship was seaworthy. If the ship was not seaworthy within the meaning of the rule on that subject, so that the cargo was liable to be damaged by a storm of ordinary intensity, the fact that the particular storm which did the damage was of extraordinary violence would not exempt the owner from liability."

The rule has been consistently stated in other circuits as follows:

Artemis Maritime Co., Inc., et al v. Southwestern Sugar & Molasses Co., Inc., 189 F2d 488 (4th Cir., 1951), at p 491:

"Proof that sea water entered the cargo tanks raises a presumption of 'unseaworthiness' which the vessel appellant here must rebut by producing clear proof that the loss and damage did *not* result from failure to exercise due diligence to make the vessel seaworthy in fact, and that it *did* result from a peril of the sea. *This heavy burden is not carried if the issue is left in doubt.*" (Emphasis supplied)

The SS ASTURIAS, 40 F Supp 168, at p 173, (D.C.S.D.N.Y., 1941), affirmed, 126 F2d 999 (2nd Cir., 1942):

"Quite apart from the Carriage of Goods By Sea Act, it is the duty of the carrier under the General Maritime Law, when the cargo is not delivered in the like order as received, to show affirmatively that the damage arose from an excepted peril . . .

"The Asturias encountered rough weather and high seas, not, however, unusual for the season of the year on that route. No structural damage was sustained by the vessel. Mere proof of damage to

> cargo by sea water is insufficient . . . The efficient cause must be sought in those conditions or events which account for the entrance of sea water . . . Since that case, the court was unable to determine the cause of the entrance of the sea water into the vessel, the doubt was resolved against the carrier . . ."

See also *The CYPRIA*, 137 F2d 326, at p 329, (2nd Cir., 1943), 1942 AMC 985 where the court disposed of the shipowner's contention that the vessel's rivets may have been weakened by encountering ice, as follows:

> " . . . Were the ice the sole possible cause of the damage this might be a reasonable suggestion, but not here, *where there are other pre-existing, and at least equally proximate, causes*, which the shipowners failed to exercise due diligence to avoid. The burden was on the shipowners to bring the ship within the statutory exemption from liability for unseaworthiness." (Emphasis supplied)

The Canadian Act was referred to in *The IRISTO*, 43 F Supp 29 (D.C.S.D.N.Y., 1941), at pp 35-36, as follows:

> "All of the through bills of lading issued by the Canadian railroads incorporated the Canadian Water Carriage of Goods Act, which relieved a carrier if the loss was due to negligence in navigation or management, *provided, of course, that a seaworthy ship was furnished and/or due diligence was exercised by the owner and/or carrier to make the ship seaworthy*." (Emphasis supplied)

That the peril of the sea exception to liability must be proven the sole proximate cause of the loss has been consistently recognized under the Canadian Water Carriage of Goods Act of 1936. See The *KEYNOR*, 1943 AMC 371, (Supreme Court of Canada), and *The ARLINGTON*, 1943 AMC 388, (Supreme Court of Canada).

The rule is generally stated in 80 CJS (Shipping), § 125, at p 936, as follows:

> "Proximate cause. In order that the act of God may excuse the carrier, it must be not only the sole, but the immediate, and not the remote, cause of the loss. The carrier is not excused where his negligence is a concurring cause, although an act of God may have been the immediate cause."

The extent of the burden imposed upon a carrier to prove a statutory exception to liability as the sole proximate cause of the loss was recognized by this court in *The INDIEN*, 71 F2d 752 (9th Cir., 1934), at p 756, as follows:

> "*From the foregoing, it will be seen that, in a case like this, the problem before the chancellor is not that of a nice balancing of evidence, pro and con, on delicate scales. After a careful study of the testimony and the exhibits, he must, in order to find for the shipowner, be convinced beyond at least a substantial doubt that the vessel was in fact seaworthy.*" (Emphasis supplied)

The burden imposed upon the carrier under this rule is illustrated by the following statement of the United States Supreme Court in *The SOUTHWARK*, 191 US 1, 48 L ed 65, (1903) at p 72:

> "But whether fault can be affirmatively established in this respect, it is not necessary to determine. The burden was upon the owner to show, by making proper and reasonable tests, that the vessel was seaworthy and in a fit condition to receive and transport the cargo undertaken to be carried; and if, by the failure to adopt such tests and to furnish such proofs, *the question of the ship's efficiency is left in doubt*, that doubt must be resolved against the shipowner, and in favor of the shipper." (Emphasis supplied)

See also *Standard Oil Co. (N.J.) v. Anglo-Mexican Petroleum Corp.*, 112 F Supp 630 (D.C.S.D.N.Y., 1953).

In its effort to qualify the PENNSYLVANIA storm as a peril of the sea exception to liability, petitioner has lost sight of the basic rule on causation, as outlined in the foregoing authorities. Even if the storm was of such violent proportions as to otherwise constitute a peril of the sea, it is not a defense unless proven to be the sole cause of the loss. The burden of this proof is on the carrier, and is not sustained if the issue is left in doubt.

The evidence establishes, and the trial court has found, that various factors of unseaworthiness com-

bined to cause the sinking of the SS PENNSYLVANIA. Even if it should appear that a violent storm otherwise qualifying as a peril of the sea, combined with the unseaworthiness to cause the loss, under all authorities the storm will not qualify as a statutory exception to petitioner's liability.

However, the trial court also held that the storm was not so severe as to constitute a peril of the sea and the finding in this respect is well supported by the evidence and the most recent and well considered decisions.

Petitioner conspicuously omits any reference to the leading decision of the Ninth Circuit, involving a storm in the North Pacific, *The INDIEN*, 71 F2d 752 (9th Cir., 1934). In that case this court reviewed testimony concerning the storm encountered by the vessel in question as follows at p 754:

> "On February 7, the ship ran into a North Pacific winter storm. The weather increased in severity on February 8 and 9. Moller, the first officer of the Indien, testified that on the latter date the velocity of the wind 'was along sixty miles [an hour] generally, and up to ninety miles in gusts.' Capt. Moloney, a marine surveyor, with a third of a century of maritime experience, declared that on a North Pacific voyage in the winter months, a 'vessel is continually shipping heavy seas . . . on her deck,' that February is considered one of the three worst months in those waters, that 'there is

> nothing else to be expected except heavy gales,' and that it is 'a very stormy passage'."

The court did not rule on the peril of the sea issue in the above case since the shipowner left in doubt proof as to the seaworthy condition of the vessel or the exercise of due diligence with respect thereto and exoneration was, accordingly, denied.

The tests most uniformly and recently applied in determining the qualification of a storm as a peril of the sea are illustrated by the following decisions:

In *The CLEVECO*, 59 F Supp 71 (D.C.N.D. Ohio E.D., 1944), the court defined a peril of the sea as follows, at p 81:

> "What is a 'peril of the sea' has been the subject of many judicial interpretations, but most of the authorities agree that the weather, to reach proportions that would absolve owners of liability for injury or loss, must be 'irresistible, overwhelming, and extraordinary for the particular time of year to be a good exception and not a common occurrence at that season of the year' . . .".

In the case of *Artemis Maritime Co., Inc. et al v. Southwestern Sugar & Molasses Co.*, 189 F2d 488 (4th Cir., 1951), the court said at p 491:

"The excepted 'peril of the sea' does not come into play merely upon proof that the vessel encountered heavy seas and high winds, if the weather encountered might reasonably have been anticipated and could have been withstood by a seaworthy vessel . . .".

In *The VIZCAYA*, 63 F Supp 898 (D.C.E.D.Pa., 1945) the court said, at p 903:

"The contention that the damage was occasioned by perils of the sea is, in my estimation, ill-founded. True, the weather at times was severe, but considering that the voyage involved crossing the North Atlantic in the winter season, it cannot be said that the weather encountered was not to be anticipated. The weather was not 'catastrophic', or 'of such a nature' as to constitute a good exception in the statute or the bills of lading . . .

"The proper approach is indicated in Societa Anonima, etc. v. Federal Ins. Co. (The Ettore), 2 Cir., 62 F.2d 769, at page 771, 1933 A.M.C. 323 at page 326: 'Gales are likely at all seasons in the Atlantic, and this was at most not more. She should have been able to withstand it, else she was not reasonably fit for the duties she had undertaken, and was therefore not seaworthy'."

In the case of *The ARAKAN*, 11 F2d 791 (D.C.S.D. Cal., N.D. 1926), the court commented as follows with regard to heavy weather, at pp 791-792:

"Claimant's initial position is that the leakage resulted from 'heavy, tempestuous, and extraordinary' weather, amounting to a peril of the sea, which as such would be excused by the provisions of its bills of lading. *This defense, to say the least, is without novelty; it is the carrier's best, though least dependable, friend.* Judged by well-known and usually adopted tests, it must fail in this case, because it is apparent from the evidence that the weather encountered by the vessel, if not actually anticipated, certainly was of a kind reasonably to have been expected on a trans-Pacific voyage, and hence not a peril of the sea . . . There was, in brief, nothing 'catastrophic' about it." (Emphasis supplied)

In the case of *THE SOUTHERN SWORD,* 190 F2d 394 (3rd Cir., 1951), it appeared that a barge filled with coal sank in a Force 7 gale. Holding that this wind did not constitute a peril of the sea the court said, at p 396:

"The prevailing and, in our judgment, correct judicial view was expressed in The Manual Arnus, D.C.S.D.N.Y. 1935, 10 F. Supp. 729, 732: '. . the weather must be irresistible, overwhelming, and extraordinary for the particular time of year to be a good exception . . .' "

In the case of *The WEST KEBAR,* 147 F2d 363 (2nd Cir., 1945), it appeared that in the month of January damage to cargo was caused by a deck load

coming adrift and breaking openings in the deck, similar to the events which occurred on the SS PENNSYLVANIA. A wind of Beaufort Scale Force 9 and 10 during a storm in the North Atlantic with seas over the deck was responsible for the deck load coming adrift. The court held that such a storm was not unexpected or catastrophic, but in fact to be expected in such waters at such season.

Petitioner refers to a definition advanced by Judge Learned Hand in *Philippine Sugar C. Agency v. Kokusai Kisen Kubushiki Kaisha*, 106 F2d 32 (2nd Cir., 1939), to the effect that the phrase "perils of the sea" means "*nothing more, however, than that the weather encountered must be too much for a well found vessel to withstand*". (Emphasis supplied) A similar standard was recognized and applied in a recent case by the Fourth Circuit, *Artemis Maritime Co., Inc. et al v. Southwestern Sugar & Molasses Co.*, 189 F2d 488 (4th Cir., 1951), where the court stated, at p 491:

> "The excepted 'peril of the sea' does not come into play . . . if the weather encountered might reasonably have been anticipated and could have been withstood by a seaworthy vessel."

The present rule of the Second Circuit is illustrated by the case of *The WEST KEBAR*, 147 F2d 363 (2nd

Cir., 1945), where the court stated, in disallowing a defense of a peril of the sea, at p 366:

> "The case comes down to whether a ship proves that she is well found for a winter Atlantic voyage, when her stow breaks apart under such conditions. *We do not see how less can be asked of her upon such a voyage, than that she shall successfully meet such weather, for surely gales—indeed even 'whole gales'—are to be expected in such waters at such a season.*" (Emphasis supplied)

It is apparent that under the very test advanced by Judge Learned Hand in *Philippine Sugar C. Agency v. Kokusai Kisen Kubushiki Kaisha*, supra, and quoted at page 53 of petitioner's brief, the PENNSYLVANIA storm fails to qualify as a peril of the sea. We have previously reviewed the evidence that 16 well found ships operating in the area of the PENNSYLVANIA storm successfully withstood the full duration of the wind and sea conditions in which the SS PENNSYLVANIA foundered. These vessels sustained no serious damage and completed their respective voyages without assistance. This evidence alone eliminates the storm as a peril of the sea under the standard advanced by Judge Learned Hand in *Philippine Sugar C. Agency v. Kokusai Kisen Kubushiki Kaisha*, supra. In the instant case we have even stronger evidence which precludes the defense of a peril of the sea under this stand-

ard. As previously pointed out, several of the aforementioned 16 vessels did not merely heave to and ride out the storm in normal navigating procedure under such circumstances. To the contrary these vessels, including a Liberty class vessel, which petitioner admits is inferior in design, strength and power to the SS PENNSYLVANIA, actively maneuvered in search and rescue operations throughout the height and full duration of the storm.

It is significant that none of the cases cited by petitioner in its opening brief involved factual situations, comparable to this case where other vessels did not merely seek protection or relief from the storm but actively engaged in search and rescue efforts. Likewise, none of the cases relied upon by petitioner involved factual situations where other vessels comparable or inferior in size, design or power were reported to have successfully withstood the force of the same storm encountered by the vessel which was involved in the litigation.

Petitioner asserts that the finding of the trial court that the storm was not a peril of the sea is predicated on the sole fact that all other vessels in the storm area withstood the wind and seas. In this connection, petitioner cites on pages 58 and 59 of its brief two earlier cases to the effect that a peril of the sea defense is

not lost by a mere showing that a "stouter" ship would have outlived the storm. The irrelevance of these decisions to the instant case is manifest. In the instant case, the record shows that a weaker vessel, inferior in size, strength and power, not only withstood the storm, but was subject to the most exacting ordeal of participating throughout the entire duration of the storm in rescue-search operations.

The finding of the trial court that the PENNSYLVANIA storm was not a peril of the sea, available to petitioner as a statutory defense, is clearly supported by:

1. Petitioner's failure to prove that the storm was the sole and proximate cause of the loss and the evidence, as the trial court found, that the vessel's unseaworthiness was the proximate cause of her loss.

2. Petitioner's failure to prove the exercise of due diligence to make the vessel seaworthy.

3. The testimony of the most qualified and experienced master mariners that the storm was a typical storm in the Gulf of Alaska, neither unprecedented or catastrophic, but of the character to be anticipated on the Great Circle Route in the winter season.

The trial court's finding that the storm was not a peril of the sea is abundantly supported by the evidence, and the authorities. The integrity of this finding should not be disturbed on appeal. See *McAllister*

v. United States, 348 US 19, 99 L ed 20, (1954); *International Nav. Co. v. Farr*, 181 US 218, 45 L ed 830, (1901).

II

The evidence provides ample support for the findings of the trial court that the proximate cause of the sinking of the PENNSYLVANIA was her own unseaworthiness; that the failures and difficulties outlined in the vessel's radio messages were factors of unseaworthiness, and the contributory factors proximately causing the sinking; that the vessel was unseaworthy by reason of these factors at the inception of her voyage (see Findings of Fact Nos. IV and V, and petitioner's Specification of Errors Nos. II and V), and that petitioner failed to exercise due diligence to make the vessel seaworthy (see Finding of Fact No. VI and petitioner's Specification of Errors No. III and IV)

We submit that the above findings are entirely clear but in view of petitioner's professed inability to understand them (see petitioner's opening brief page 61 et seq.), we shall briefly outline the basic elements of these findings.

The trial court found that the specific failures and breakdowns reported by the vessel's radio messages were each "factors" — or in other words the active physical product or consequence — of unseaworthy

conditions prevailing at the inception of Voyage 6, and that these active factors were incidents of such unseaworthiness which combined to cause the ship's loss as follows:

1. The 14 foot crack on the port side, allowing the entrance of sea water into the engine room, was an active factor of unseaworthiness contributing to the vessel's loss, and was the product of the unseaworthy condition of the hull at the inception of Voyage 6, for the route to be traversed and weather to be encountered.

2. The complete failure or breakdown of the vessel's steering systems in heavy seas was a contributing cause of the loss and an active factor or product of the faulty, unseaworthy condition prevailing in the machinery of the steering systems at the inception of Voyage 6.

3. The vessel took water in No. 1 hold, which contributed to her loss. This again was a direct product of the unseaworthiness of the hull at the inception of Voyage 5. (Since there is no evidence that the No. 1 hatch came open, and no cargo was stowed in the way of this hatch, a further break in the vessel's hull was the only possible source of the entry of water in No. 1 hold.)

4. The drifting deck cargo took off the tarpaulins on the forward hatches and No. 2 hatch was open and full of water. This event was a factor of unseaworthiness contributing to the vessel's loss. It was the product of unseaworthy and insecure conditions of the forward hatches, and the improper and unseaworthy stowage of cargo on the vessel's forward deck at the inception of Voyage 6.

The following evidence provides ample support for Findings of Fact IV and V, as above outlined:

A. Presumption of Unseaworthiness.

A presumption that the SS PENNSYLVANIA was unseaworthy at the inception of her voyage has been established in respect to each of the many failures and breakdowns which contributed to and proximately caused her loss. These presumptions imposed upon the carrier the duty of coming forward with an explanation for these failures consistent with its right to exoneration under the Carriage of Good by Sea Act of 1936 and the equivalent Canadian statute. The uniform application of this rule is illustrated by the following authorities:

In the case of *The MEDEA*, 179 F 781 (9th Cir., 1910), the court held that the presence of seawater in cargo compartments raised a presumption of unsea-

worthiness and it was on the vessel to prove that the damage was caused by a peril of the sea.

The above rule was recognized by the Second Circuit in *The SS ASTURIAS*, 126 F2d 999 (2nd Cir., 1942), where the court stated at p 1001:

> "Proof of the presence of seawater, it cannot be disputed, raises a presumption of unseaworthiness which the carrier must rebut."

With further regard to the presumption, the court stated:

> "As the trial court found that the ship failed to rebut the presumption of negligence created by the presence of seawater, and as seawater contributed to the damage in some unknown degree, the ship is liable for the whole damage."

As stated in *Artemis Maritime Co., Inc., et al v. Southwestern Sugar & Molasses Co.*, 189 F2d 488 (4th Cir., 1951), at p 491:

> "Proof that seawater entered the cargo tanks raises a presumption of 'unseaworthiness' which the vessel appellant here must rebut by producing clear proof that the loss and damage did *not* result from failure to exercise due diligence to make the vessel seaworthy in fact, and that it *did* result from a peril of the sea..."

In *Metropolitan Coal Co v. Howard*, 155 F2d 780 (2nd Cir., 1946), Judge Learned Hand stated at p 783:

> ". . . courts have recognized over and over again that unfitness developing in a vessel shortly after she breaks ground, is proof enough of unseaworthiness."

In *The PLOW CITY*, 122 F2d 816 (3rd Cir., 1941), the court stated at p 818:

> "A vessel which takes in such quantities of water as to put her down at the head a few days after leaving port cannot be presumed to have been seaworthy when she left port. The fact must be affirmatively proven. . . The owner therefore had the burden of proving that the Plow City was seaworthy when she departed from Galveston."

In *The SOUTHERN SWORD*, 190 F2d 394 (3rd Cir., 1951), the court in referring to the rule where a contract of private carriage is involved, stated, at p 397:

> "It is true that in such circumstances the burden of showing unseaworthiness is upon the complaining shipper . . . But the logical inference of unseaworthiness which follows from the unexplained sinking of a vessel in weather she should be able to withstand suffices to discharge that burden unless and until the carrier shall affirmatively show exculpatory circumstances."

It should be noted that although *The SOUTHERN SWORD*, supra, involved a private carriage, the court held that the presumption of unseaworthiness arising from the sinking of the vessel in question was sufficient to throw the entire burden upon the carrier of relieving itself of liability.

In *The CYPRIA*, 137 F2d 326 (2nd Cir, 1943), the court observed that the storm in question did not constitute a peril of the sea in view of the fact that the wind and sea conditions were not extraordinary for the season of the year, and further stated at p 328:

> "Moreover, other circumstances show that the vessel was not seaworthy for the voyage. This might be presumed from the mere loss of the rivet in the absence of redeeming sea perils."

In this case the court held the vessel unseaworthy because of a defective rivet which allowed seawater to enter the cargo holds. The court also held that there was insufficient evidence of due diligence by the carrier in inspection of the defective rivet and that the vessel owner accordingly assumed the risk of damage arising from the unseaworthiness.

The severe burden imposed upon a shipowner to bring itself within the statutory exception to liability is not only illustrated in *Artemis Maritime Co., Inc. et*

al v. Southwestern Sugar & Molasses Co., supra, and other cases cited, supra. but in *The INDIEN*, 71 F2d 752 (9th Cir., 1934), where the court stated, at p 755:

> "At the outset, it must be borne in mind that the burden of proving the vessel's seaworthiness rests upon the shipowner. *Any doubt must be resolved against him*, 'with the presumption in favor of the appellee that it was the fault of the appellant.'" (Emphasis supplied)

The above principle has likewise been adopted and applied by Canadian courts as illustrated by *The ARLINGTON*, 1943 AMC 388, where the Supreme Court of Canada expressed the rule as follows, at p 390:

> "The primary duty of the respondent, therefore, being to properly and carefully load, handle, stow, carry, keep, care for and discharge the wheat, the onus was upon it to show the cause of the loss and bring itself within one of the exceptions. The shortness of the time that elasped between the sailing of the *Arlington* from Port Arthur and its foundering is a circumstance to be taken into consideration in deciding whether the ship was unseaworthy."

Under the evidence and the authorities reviewed above a presumption of the unseaworthiness of the SS PENNSYLVANIA at the inception of her Voyage 6 has clearly been established with respect to the hull

of the vessel, the forward hatches, the insecure and unseaworthy stowage of deck cargo and the vessel's steering system. In dealing with each of these unseaworthy conditions we shall show that the petitioner has failed to rebut the presumptions of unseaworthiness by coming forward with an acceptable explanation of the cause of the several failures and breakdowns which would bring petitioner within one of the statutory exceptions to liability. In addition we shall also review the substantial affirmative evidence supporting the finding of the trial court that the SS PENNSYLVANIA was unseaworthy.

B. Evidence of a Defective Hull Structure.

In *The SILVIA*, 171 US 462, 43 L ed 241 (1898), the Supreme Court laid down the following rule as to a vessel's seaworthiness:

> "The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she had undertaken to transport."

The season and waters to be traversed on the voyage in question are to be taken into account in determining the fitness of the ship. As stated in *The M. J. WOODS*, 206 F2d 240 (2nd Cir., 1953), at p 243:

"A vessel is unseaworthy unless she is reasonably fit to carry her cargo safely despite the perils to be anticipated on the voyage."

The SS PENNSYLVANIA (formerly the Luxembourg Victory) was sold by the United States government to petitioner, without warranty under bill of sale effective February 17, 1951.

Between 1944 and January, 1951, the vessel was owned by the United States government and operated in the Pacific area. The record is replete with damage sustained by this vessel commencing with her first voyage in 1944 when she ran over a reef. At the time she struck the reef the vessel was empty with no ballast and traveling at a speed of 13 or 14 knots (Tr 2221-2222). As a result of this incident, the ship's hull sustained serious bottom damage which was later repaired at San Francisco (Exh 147).

While the vessel was owned by the United States government she sustained extensive damage to her hull and frames as a result of heavy weather, collisions and groundings. This damage was at times repaired by complete replacement of damaged plates, at other times by repairs to the damaged plates and at times by merely restoring the plates to their original shape (Exh 147; Tr 2391 through 2430 and 2439 through

2585). Based on a survey of the vessel in December, 1950, surveyor J. D. Gilmour testified that "both sides of the ship from one end to the other were very, very seriously damaged" (Tr. 2383).

American Bureau of Shipping Survey Report 3076, dated May 6, 1948, (Exh 147) noted that the bottom plating of the vessel from No. 2 to No. 5 double bottoms was wavy, the deepest distortions being ¾" to an inch and the average distortion being ¼ of an inch. This wavy bottom condition was never repaired or corrected (Tr 2401).

American Bureau of Shipping Survey Report 8785, dated January 12, 1951 (Exh 147), noted a small amount of hog in the vessel's bottom although marine surveyor Francis P. Miller testified that when the SS PENNSYLVANIA was launched there was no hog in the original construction (Tr 418).

When petitioner took title to the vessel it was provided with complete survey reports reflecting previous surveys, both damages and repairs. Despite this information there is absolutely no evidence that petitioner made any inquiry as to whether the vessel had a hog at the time of its original construction. The survey reporting the hog was apparently forgotten by petitioner for there is no evidence that petitioner made

any of the recognized tests or inspections by transit, level or wire to determine whether the vessel had a hog or not.

Testimony at trial also disclosed the existence of the following main deck fractures on the vessel, discovered in February, 1951:

> 4 deck fractures around pad eyes between No. 4 and No. 5 hatches (Tr 404, 445); 2 separate fractures of the main deck plates on the starboard side between No. 2 and No. 3 hatches in the way of 2 deck pads (Tr 617, 638).

The above fractures affected the seaworthiness of the vessel and had to be repaired before a certificate of seaworthiness could be issued (Tr 618, 645, 648). The seriousness of any crack in the deck plates of a welded steel vessel is illustrated by the following testimony of petitioner's witness Commander Rivard:

> "A As to the importance, any fracture is important". (Tr 618-619)
>
> "Q In other words, from your answer to my question I think you have stated that where there is a crack in the plates there it was an essential repair job, and as I understood it the vessel was not seaworthy until such repairs were made to those cracks; is that correct?
>
> A On the main deck?
>
> Q Yes, on your pad eyes.
>
> A Yes. When I use the expression seaworthiness in that case, it was a fracture that I had found,

and it goes without saying that if in a case like that, if I find a fracture, it must be repaired before I can pass on it.

Q Well, the vessel is not seaworthy until it is repaired, is it?

A That is correct.

. . .

Q Would those 8-inch cracks in the deck of the vessel affect her seaworthiness?

A Yes, they can." (Tr 647-648)

In our opening brief we have referred to the 22 foot fracture in the main deck, sustained by the SS PENNSYLVANIA on November 2, 1951 during Voyage 5. The vessel suffered this casualty while proceeding in heavy weather with an air temperature of 54° and a water temperature of 60° (Exh. 44) and it is established that the 22 foot crack originated at a pad eye on the starboard side of the vessel (Tr 167).

The origin of this crack is found in the uncontradicted testimony of Morgan L. Williams, an expert metallurgist employed by the Bureau of Standards, who tested a sample of the deck plate of the SS PENNSYLVANIA submitted by the U. S. Coast Guard to the Bureau of Standards for examination (Tr 1871; Exh 136). Mr. Williams testified that this Class 1 fracture started from an old and apparently visible crack at a pad

eye on the starboard side of the vessel's deck. As an expert metallurgist he also testified that on the basis of rust deposits this fracture had existed for a long time and in his opinion *was not a hairline crack* (Tr 1885-1887).

Petitioner's callous indifference to the safety of the ship and those that sailed upon her is once more demonstrated by the failure of Mr. Vallet to inspect the deck of the vessel for the existence of cracks around the pad eyes of the same kind that caused the crack on Voyage 5. Although no real examination was ever made of any other area on the deck, petitioner had at hand, in addition to Mr. Vallet and others at the vessels home port in Portland, ample personnel and facilities for making even a perfunctory examination. For example, we note the earlier incident when a spare propeller was lost from the poop deck of the SS PENNSYLVANIA, following which the petitioner had in attendance upon the vessel its general counsel and a member of its board of directors. These personnel were aboard the vessel in the company of a metallurgist, because petitioner was making a claim for the damage done to its vessel.

The significance of the hog noted in the vessel, the deformation evidenced by the wavy bottom plates, and the numerous incidents of fractures sustained in the main deck plates of the vessel is emphasized in the

testimony of Robert A. Hechtman, an eminently qualified structural engineer, whose scholastic qualifications were not equaled by any other witness. He commenced his career with the practical experience of building steamships and since 1945 concerned himself with the problems associated with brittle fracture in welded steel vessels. Mr. Hechtman has studied with, and has conducted experiments for, the Committee of Ship Construction of the War Metallurgy Board, the Office of Naval Research, the Navy Department, the Ship Structure Committee, the Bureau of Shipping and he has worked with the American Welding Society and the National Research Council (Tr 2340-2353).

Mr. Hechtman's attention was directed to surveys of the ship and the numerous incidents of fracture sustained in the main deck. With reference thereto, he testified as follows:

> "Q Mr. Hechtman, based upon your examination of the surveys described in your Table No. III and the testimony concerning the cracks in the hull structure as related to us earlier in your testimony, do you have an opinion as to whether or not the PENNSYLVANIA as a welded steel structure was sound or unsound as of January 5, 1952, the time of her sailing on Voyage No. 6? You will answer that Yes or No.
>
> A Would you read that question, please? (Question read.)
>
> THE WITNESS: I will answer yes.

Q What is your opinion?

. . .

A My opinion is that it was not entirely sound. It is based on this feeling. A number of cracks have been noted in the deck of this ship. I would expect to find other cracks also if the ship—if I were to inspect the ship very closely. I would feel that the indication of some cracks points to the definite possibility of other cracks; therefore, the possibility that the ship did go out to sea with unrepaired cracks in her structure. For that reason I would have my doubts as to her soundness." (Tr 2586-2587)

"A . . . there are fractures through the mid-body the length of the deck of the vessel, and some of these fractures are quite symmetrical with the center line of the vessel, indicating that the deck of the structure was heavily stressed in tension, the tension stresses in the areas from bending in a hogging manner.

. . .

Q . . . if the vessel was hogged it would set up tension on the deck more or less immediately above the hogging.

A That is correct.

. . .

A . . . and of course a distance on either side of it.

. . .

Q Now is it your testimony that this ship was weakened as indicated by the little cracks on the deck, and is your testimony that that all resulted from this hogging business?

A My testimony would be that it would appear that that would be the case.

. . .

A . . . there would also be high stresses forward and aft of that area.

. . .

Q Do you consider those minute cracks to be evidence of a severe and extraordinary strain on the vessel's deck?

A Yes, I do.

. . .

A . . . in a welded structure I would consider those cracks as something dangerous." (Tr 2596-2602)

"Q . . . Now the significance, Mr. Hechman, of the cracks that you have just related is what?

A That they are sources of future fractures. They are danger spots in the ship." (Tr 2370-2371)

"Q How are the forces which tend to produce bending in the hull, as you have described, related if at all to the fracture on Voyage 5?

A The damage on Voyage 5 is covered in Table 3 by Items 44 to 48, inclusive. These indicate a rather symmetrical nature of the damage with respect to the center line of the ship.

. . .

A A rather symmetrical nature of the damage with respect to the center line of the ship. For example, Items 44 to 48, together with the previous testimony in the transcripts, indicated that the pad eye fractured on both the port and starboard sides of the ship, and at two pad eyes symmetrically placed with respect to the center line of the ship. The welds port and starboard in Item No. 47 between the longitudinal bulkhead H-stanchion and the longitudinal girders fractured port and starboard.

In Item No. 48 the welds port and starboard—to the port and starboard corners of the deckhouse fractured. Those are the welds between the deckhouse corner and the deck. The observation that I made was that therefore the hull was bent in a vertical direction rather heavily.

. . .

A . . . In other words, it would cause what the ship people call a hogging moment." (Tr 2448-2449)

"Q Mr. Hechtman, are the forces which tend to produce the bending in the hull and the hogging moment which you have related in any way connected or associated with the crack which developed on Voyage 6 at Frames 93 and 94 port side?

A I have already described a number of incidents which potentially could have caused heavy hogging moments in the hull girder. And particularly those included the grounding described in Item No. 1 of my Table 3, and the fracture on Voyage 5 described in Items 44 to 48, inclusive, of my Table 3.

Going back to the grounding in the Fiji Islands it would appear from the nature of the structural damage that the ship struck in the vicinity of Bulkhead 95 or thereabouts. That would mean that heavy bending stresses causing higher tension stresses in the deck of the ship immediately above the point at which it sprung would be developed.

In the case of Items 44 to 48 in Table 3, the symmetrical nature of the damage has already been described. The bending of the ship which placed the deck in tension and sufficient to cause a group 1 casualty at Frames 72 to 74, which is approximately 60 feet forward of Frames 93 and 94.

Q How many feet forward?

A Approximately 60 feet forward. The hull is 440 feet long, so 60 feet is not a very great fraction of that length. It would appear, therefore, that the area in the region of Frames 93 and 94 should also have been rather heavily stressed.

. . .

Q All right. Now, you have discussed the forces which would bend the hull and which you described as a hogging moment. Have you found anything in these surveys of lateral forces to the starboard side of amidships which would tend to overstrain the port side shell plating?

A Yes, I have. I am speaking now of the more or less horizontal forces which would strike the ship starboard in amidships portion so as to place the port side shell of the ship in tension. I can judge the nature of these forces only by the severity of the damage which will be incurred when they strike the ship, and I refer to Item No. 10 in Table 3 which refers to the A.B.S. Report No. 1188 dated November 2nd, 1947. The nature of the damage there is extensive damage to frames and beams, Frames 54 to 58 starboard side.

I have already read the excerpt from the ship's log describing the weather conditions under which this occurred. Sheets numbered 2 and 3, I believe, cover all the damage to the hull. There is a Sheet No. 4 which does not, I believe, cover any damage to the hull structure itself. They list a number of items in which the frames and some of the welding and stiffener angles were bent or fractured." (Tr 2293-2295, 2452-2454).

The wavy bottom plates on the SS PENNSYLVANIA were never corrected and Mr. Hechtman's testimony on this point is as follows:

"Q The bottom plates that were replaced, Mr. Hechtman, how did they compare either in number or in area with the bottom platings that were noted as being wavy in Item No. 13?

A I believe there are about 60 plates, between 50 and 60 plates which would be called the bottom of the ship lying between, lying from the forward end of No. 2 hatch to the aft end—forward end of No. 2 hold to the aft end of No. 5 hold, and I have noted one plate, I believe previously, which was renewed.

. . .

THE WITNESS: "The requirements of Lloyd's with respect to distortions greater than ⅜ of an inch is that the bottom be strengthened as soon as possible." (Tr 2402-2405).

"Q Mr. Hechtman, do you agree with the requirements of Lloyd's with respect to distortions in excess of ⅜ of an inch in bottom?

A Yes I do." (Tr 2406)

"THE WITNESS: The action of a member in compression which is bent is impaired to the extent, if the distortion is ⅜ of an inch in a distance of 30 or 36 inches as it is in the case of most ships, to the extent that if it is heavily loaded that member will be forced to deform permanently. It is the hope of the designers that their members will not be forced to deform permanently under load."

(Tr 2406-2407)

"Q What effect, if any, did the distortion have upon the susceptibility of the vessel to brittle fracture?

. . .

A The bottom plate of this ship, as I remember, was somewhat under three-quarters of an inch in thickness, if my memory is correct. It spans a distance of three feet, which is the frame spacing, and if adjacent panels are distorted most of that distortion exists in the central portion of the span between frames. And the distortion of three-quarters of an inch must have been a permanent distortion, and therefore the material must have yielded. Since it has been permanently distorted, permanently yielded, it must therefore be subject to the phenomenon of strain aging.

Q In the manner that you have described as shown by your tests?

A Yes. There is also another effect of wavy bottom plating which is separate from that of strain aging.

. . .

Q What is that other effect?

A It is the effect upon the strength of the hull girder as a whole." (Tr 2418-2419)

"A . . . permanent crookedness or curvature in a compression member, reduces its strength.

Q Is that the other effect that you mentioned with respect to the significance of wavy bottom as noted in Item No. 13?

A That is correct." (Tr 2422)

Mr. David P. Brown, defending the position of the American Bureau of Shipping that a wavy bottom plate on a welded steel merchant vessel is not significant (Tr 2790-2791) admitted that the Ship Structure Committee has commenced consideration of this problem. Mr. Brown also testified that where a waviness occurs in the forward portion of the bottom of the vessel, the bottom plates are repaired. In so testifying, he stated:

> "Q Whey do they repair them?
>
> A Because if you let it go it simply gets progressively worse. It is a slamming condition.
>
> Q Then what happens?
>
> A If it gets bad, it will start some fastenings and rivets coming loose, or with the welded ships you may even develop small fractures at the point where it crosses the floor or the girder in the bottom." (Tr 2798)

Mr. Brown admitted that the condition of wavy bottom has required strengthening of the tank tops; the same strengthening which Mr. Godfrey testified should have been done after the Class 1 casualty which occurred on Voyage 5 (Tr 2158; 2161). The Maritime Administration has proposed such strengthening (Tr 420); the Coast Guard in some districts has required it (Tr 2492); Lloyd's Registry of Shipping requires strengthening of the tank tops (Tr 2813), as does the

Bureau Veritas (the French Classification Society), and The Netherlands Shipbuilders Research Association (Tr 2787). It is significant indeed that the *JOPLIN VICTORY*, while being operated by the State Steamship Company, had her tank tops strengthened after it sustained the second Class 1 casualty ever sustained by a Victory ship (Tr 2908-2909). The refusal of petitioner State Steamship Company to follow safe practices in the maintenance of its ships is demonstrated by the fact that of the five Class 1 casualties sustained by Victory class ships in over 2,000 ship years' experience, three of those casualties were sustained by ships operated by petitioner State Steamship Company.

It is apparent from the testimony of Professor Hechtman that the hull structure of the SS PENNSYLVANIA had been subjected to abnormal stresses producing a condition known as "strain aging" (Tr. 2427-2428) which increased its susceptibility to brittle fracture in cold temperatures (Tr 2413-2414). This serious weakness of the hull of the vessel is convincingly confirmed by the fact that the vessel on Voyage 5 sustained her first Class 1 hull casualty, consisting of a 22 foot deck fracture, in an air temperature of 54° and a water temperature of 60° which is admitted by petitioner's witness David P. Brown to be a relatively high temperature in which to sustain a hull fracture (Tr 2773).

The significance of this major hull fracture is found in the findings of the Ship Structure Committee of the Board of Investigation, incorporated into "The Design and Method of Construction of Welded Steel Merchant Vessels", Section H, Finding G, p 9 (Exh 185) where it is reported:

> "The highest incident of fracture occurs under the combination of low temperature and heavy seas."

The foregoing 22 foot deck fracture was classified as a Class 1 casualty, defined by the Ship Structure Committee as one which has weakened the main hull structure so that the vessel is lost or in dangerous condition (Tr 1864-1865) or one where the strength of the structure is so weakened that it would be in imminent danger of further failure (Tr 2770). This was the first Class 1 casualty suffered by a Victory ship in over 2,000 ship years' experience (Tr 2767-2770).

The record discloses that after the vessel sustained the above casualty on Voyage 5 it returned to Portland, Oregon in heavy seas and during her return to port the crack in the stringer plate was opening and closing ¼ of an inch (Tr 364). Petitioner's witness, David P. Brown, recognized the further stress thereby imposed upon the vessel's hull in the following testimony:

"Q . . .

We have these factors: A Victory ship which has sustained a Class 1 casualty such as a crack that was sustained by the PENNSYLVANIA on Voyage 5. While that crack existed the ship was heavily loaded. The seas were high. It was returning to the mainland at high speed.

Would it be reasonable to expect that coupled with the loss of strength resulting from the original fracture, additional fractures might be started?

A Yes. Could I elaborate the answer in that hypothetical question?

Q Pardon?

A Additional fractures would be expected to be within the immediate area in the girth of that particular fracture." (Tr 2780)

and

"Q 'While crack arresters have been effective in stopping a great number of fractures, continued experience has demonstrated that vessels can break in two in spite of arresters. In such cases, however, the ships were under such conditions of loading and heavy seas as to make it not unreasonable to expect that, coupled with the loss of strength resulting from the original fracture, additional fractures might be started.' Do you agree with that statement?

A I agree with that, yes." (Tr 2903-2904)

The opinion of the District Court in *The ESSO MANHATTAN*, 121 F Supp 770 (D.C.S.D.N.Y., 1953), 1953 AMC 1152, presents a very informative review of the subject of abnormal stresses exerted on welded steel

and its effect in weakening the structural integrity of welded steel vessels. In this case the court held that the cause of fracture in the *ESSO MANHATTAN* was a structural weakness, consisting of "a defective butt weld in a ship built of notch-sensitive steel operating under climatic conditions which brought the steel below its critical temperature." The court found that the fracture in the *ESSO MANHATTAN* commenced in a defective butt weld at the crown of the deck and it is noteworthy that the 14 foot crack sustained by the SS PENNSYLVANIA in its fatal voyage likewise commenced in a butt weld and extended down 14 feet into the engine room. The fracture in the *ESSO MANHATTAN* occurred in an air temperature of from 30 to 40 degrees and water temperature of 38 degrees, while the Class I fracture sustained by the SS PENNSYLVANIA on Voyage 5 occurred at substantially higher sea and air temperatures.

The Design and Method of Construction of Welded Steel Merchant Vessels (Exh 185) contained detailed reports of the investigation and findings as to the cause of fractures in the ESSO MANHATTAN and the evidence shows that petitioner's Marine Superintendent Vallet was familiar with this publication and had read the same prior to the sailing of the SS PENNSYLVANIA on Voyage 6 (Tr 209).

That the SS PENNSYLVANIA's hull was structurally weak is forceably demonstrated by the events immediately attending her loss, as disclosed by her radio message reporting the 14 foot crack down the port side of the vessel starting in a weld between Frames 93 and 94, and the entrance of water into No. 1 hold.

Less than three months had elapsed between the Class 1 hull fracture sustained on the fatal voyage and the Class 1 casualty which the vessel sustained on her immediately previous Voyage 5. In view of the fact that only 5 Class 1 hull casualties were recorded as of the date of trial of this case for *all* Victory class vessels built in this nation, a Class 1 hull fracture on two successive voyages establishes a sad record for the integrity of the SS PENNSYLVANIA's hull. The record in this case clearly supports the finding of the trial court that the vessel was structurally weak and sensitive to cracking.

Two critical failures in the hull of the SS PENNSYLVANIA on her fatal voyage contributed to her loss. The first casualty reported was the 14 foot crack down the port side between frames 93 and 94, allowing sea water to enter the engine room. The second hull failure is evidenced by the radio dispatch reporting that sea water was entering the No. 1 hold.

Under the authorities above outlined, the foregoing hull failures alone impose upon petitioner the burden of coming forward with an explanation of the cause of the failures and the entrance of sea water, under a statutory exception to liability. See *Artemis Maritime Co., Inc., et al v. Southwestern Sugar & Molasses Co.*, 189 F2d 488 (4th Cir., 1951); *The MEDEA*, 179 F 781 (9th Circ., 1910); *The SS ASTURIAS*, 40 F Supp 168 (D.C.S.D.N.Y., 1941), affirmed 126 F2d 999 (2nd Cir., 1942). No such explanation can be offered by petitioner for either of the foregoing failures.

As to the 14 foot crack on the port side, petitioner's only explanation is to assert, generally, that it was caused by the laboring of the vessel in the storm, which the trial judge has held did not constitute a peril of the sea. (In fact, petitioner's only explanation as to the failures and breakdowns suffered by the SS PENNSYLVANIA in her final moments is the speculative, general and entirely inadequate conjecture that they were all caused by the storm).

The significance of the 14 foot crack which permitted water to enter the engine room and the taking of water in the forward holds becomes apparent when we consider that the PENNSYLVANIA was "a one compartment ship", which means that the vessel could no longer maintain her buoyancy after one hold was full of water.

At pages 100-101 of its brief, petitioner makes the surprising representation that the entrance of water in the engine room, caused by the 14 foot crack in the vessel's hull, was not a factor of unseaworthiness and that this hull fracture and the entry of water into the engine room had no bearing upon the vessel's loss. Consider this assertion in light of the definition of a Class 1 hull fracture as one which weakened the main hull so that the vessel is lost or in a dangerous condition (Tr 1864-1865)! Petitioner further makes the remarkable assertion that ". . . the water entering the engine room never gave any trouble" (petitioner's brief, p 101). The contrary is established by the very ship's radio message reporting this crack and advising that the vessel would turn around as soon as possible and proceed to Seattle.

The dire circumstances of a ship crippled in heavy seas by a Class 1 hull fracture, placing the vessel in imminent danger of further failure (Tr 2770) is obvious. The continued existence of this fracture, coincident with the subsequent entry of water in No. 1 hold, the entry of water through No. 2 hatch and the complete breakdown of the steering systems, has a clear causal relationship to the foundering of the SS PENNSYLVANIA. Certainly the fracture created an immediate and major weakness in the vessel's hull at a

time when all the capacities of a staunch ship were needed.

What was the cause of taking water in No. 1 hold? At pages 108 and 109 of its brief, petitioner admits that it cannot explain the cause stating, "Nor is there in the evidence any information as to *how* or *why* water got into No. 1 hold." Then at page 109, petitioner speculates that the cause was the violence of the seas.

Again petitioner completely fails to appreciate that under both American and Canadian authorities it is obliged to come forward with a specific and adequate explanation for the structural failures of the vessel allowing entry of water in No. 1 hold. It has not carried this burden if the issue is left in doubt. Conjecture will not suffice.

Actually petitioner *cannot* offer an adequate explanation for the hull failures evidenced by the 14 foot crack on the port side and the flooding of No. 1 hold. It *cannot* show that the portions of the vessel sustaining these hull casualties were inspected at all subsequent to the routine annual survey in August, 1951.

In our opening brief we have pointed out that the only inspection given this vessel at the conclusion of Voyage 5 was a routine visual inspection of the underwater portion of the hull. No examination whatsoever

was made of the portion of the hull above water. No examination was made of the main deck of the vessel where numerous fractures had been discovered in the past, primarily at pad eyes. The failure to examine the main deck was particularly negligent in view of the evidence that the 22 foot deck fracture sustained on Voyage 5 opened and closed one-quarter of an inch during the vessel's return to port, which imposed a further strain on the vessel's hull and created further susceptibility to additional fractures (Tr 364; 2780). No examination was made of the interior of the vessel's hull, which at the time of drydocking at the conclusion of Voyage 5 was not even unloaded. Inspecting personnel of the American Bureau of Shipping and the Coast Guard were not advised of the damage sustained on Voyage 5 or given any instruction or information which would guide and determine the extent of their inspection, which was, accordingly limited to a routine visual inspection of the underwater body.

Under the above circumstances petitioner seeks to rely upon statements of various surveyors, representatives of the Coast Guard and the American Bureau of Shipping, and certificates to the effect that the ship was seaworthy, which statements and certificates were the product of earlier surveys. In this case we are, of course, interested only in the seaworthiness of the ves-

sel for its intended voyage at the inception of Voyage 6, considering the season and route to be traversed. We are not interested in certificates and statements made as a result of inspections in prior years. Petitioner apparently fails to appreciate that the seaworthiness of a vessel for a particular voyage is an intrinsic fact. The vessel was seaworthy in all respects for the intended voyage or she was not, and all the pronunciations and certificates in the world will not alter her status. In fact, they do not constitute evidence of her status at the inception of Voyage 6. Any statements made or cerificates issued respecting this vessel between the conclusion of Voyage 5 and the inception of Voyage 6 must be weighed in light of the limited and superficial examination given the ship during this period. Such statements or certificates are, accordingly, to be discounted on the issue as to the seaworthiness of the SS PENNSYLVANIA as well as petitioner's exercise of due diligence. In this respect the following statement in *Compagnie Maritime Francaise v. Meyer*, 248 F 881, at p 885, (9th Cir., 1918) is particularly applicable:

> "In the present case the court below was of the opinion that the testimony of the experts who inspected the vessel before her voyage began was not conclusive; that the inspection was general, largely visual *and not particularly of the parts which proved defective.* The evidence, we think, sustains that conclusion. There is no testimony that any of

the inspectors made other than visual examination, except the witness Le Roy, who testified that he sounded with a hammer the ship's sides, and all accessible rivets, including those of the hull, but *that he could not examine all rivets for the reason that* at that date, August 27, 1907, *there was cargo in the hold.*" (Emphasis supplied).

The lack of significance of formal surveys and certificates under similar circumstances was recognized by the Oregon Federal District Court in *The NINFA*, 156 F 512 (D.C.D. Ore., 1907), where Judge Wolverton stated at p 525:

> "I place but slight value on the surveys of the Italian Consul and Lloyd's surveyors, made before the ship left London, as their duties do not call for that rigid inspection and the application of known tests for the discovery of fault required of the owner for the determination of whether his vessel is seaworthy."

And in *Artemis Maritime Co., Inc. et al v. Southwestern Sugar & Molasses Co.*, 189 F2d 488 (4th Cir., 1951), at p 492:

> "Clearly the duty of the shipowner here is nondelegable . . . While various precautions have some evidentiary value, neither 'visual inspection' . . . nor 'inspection of hull and machinery of the vessel' . . . *nor 'diligence in the acquisition of seaworthiness certificates'* . . . is conclusive as to the fulfillment by the vessel owner of his duty to exercise the requisite care . . . All the testimony, and all

the surrounding facts and circumstances, must be considered." (Emphasis supplied)

See also *The FELTRE*, 30 F2d 62 (9th Cir., 1929), 1929 AMC 279; *RIDEOUT*, *No. 7*, 53 F2d 322 (9th Cir. 1931), 1931 AMC 1870; *The CYPRIA*, 137 F2d 326 (2nd Cir. 1943).

Under the basic test of seaworthiness enunciated by the United States Supreme Court in *The SILVIA*, 171 US 462, 43 L ed 241, (1898), it is clear that the weakness in the hull of the SS PENNSYLVANIA at the inception of Voyage 6 was such that she was not reasonably fit to carry cargo undertaken to be transported, considering the season and the waters to be traversed.

C. Evidence of a Defective Steering System.

The trial court found that the failure or breakdown of the vessel's steering system in heavy seas was a product of the unseaworthy condition of the steering machinery at the inception of Voyage 6 and that such failure was a proximate cause of the vessel's loss.

The first radio message of the ship reporting the failure of its steering system was originated at 1807 GMT January 9 and appears as follows:

"ENDEAVORING TO STEER COURSE OF 110 DEGREES CANT STEER AT PRESENT TAKING WATER NR ONE HOLD AND ENGINE ROOM".

At 1930 GMT January 9 the vessel transmitted a dispatch confirming that the vessel couldn't steer and stating that if the steering gear could not be fixed it would require assistance.

At 2015 GMT January 9 the vessel reported that it was using hand steering and at 0004 GMT January 10 the vessel reported that she had the steering gear fixed but could not steer as the rudder was too far out of the water. Of course, by this time the vessel had taken water in No. 1 hold and No. 2 hold was flooded, both holds being loaded with bulk grain.

The evidence accordingly establishes that on the fifth day out of port the SS PENNSYLVANIA, while proceeding in heavy seas, sustained a critical failure of her steering system. For a period of six hours, and until some twenty-four minutes before the ship was abandoned her main steering engine was not functioning. Under all authorities there is no question that the complete failure of this vital machinery on the fifth day out of port during a critical period in the storm, and when the vessel had suffered a Class 1 hull fracture, gives rise to a presumption that the steering system was defective and unseaworthy at the time the vessel sailed.

Again the burden is cast upon petitioner to come forward with a satisfactory explanation of the cause

of the breakdown under a statutory exception to liability, and to prove the exercise of due diligence in the inspection and repair of the steering equipment. This the petitioner has not done, as the trial judge has held.

In *Metropolitan Coal Co. v. Howard*, 155 F2d 780 (2nd Cir., 1946), Judge Learned Hand stated, at p 783:

> ". . . for courts have recognized over and over again that unfitness developing in a vessel shortly after she breaks ground, is proof enough of unseaworthiness."

See also *The SOUTHWARK*, 191 U.S. 1, 48 L ed 65 (1903).

The breakdown of a vessel's steering system has been the principal issue in a number of leading admiralty decisions and in each case it has been held that the steering failure gave rise to a presumption that the vessel was not seaworthy, imposing upon the shipowner the burden of proving the exercise of due diligence and explaining the cause of the failure under a statutory exception to liability. This rule was stated as follows in *The A. H. F. SEEGER*, 104 F2d 167 (2nd Cir., 1939), where the court stated at p 168:

> ". . . it is common knowledge that the breaking of machinery as a result of which damage occurs, is not normal. . . In such a case there is ordinarily

fault on the part of the owner in operating a vessel that is not seaworthy and the law casts upon him the burden of showing not only what happened but what was done and what would have been necessary to avert the casualty. The Reichert Line, (2d Cir.) 64 F. 2d 13; Cranberry Creek Coal Co. v. Red Star Towing and Transportation Co. (2d Cir.) 33 F. 2d 272; In Re Reichert Towing Line (2d Cir.) 251 F. 214, 217."

In a recent case, *The IONIAN PIONEER*, 236 F2d 78 (5th Cir., 1956), 1956 AMC 1750, it was found that the vessel stranded as a result of the failure of the steering apparatus. The shipowner was unable to rebut the presumption of unseaworthiness thereby arising and could not show the exercise of due diligence in inspection and repair of the steering machinery. In denying exoneration, the Fifth Circuit stated, at p 80:

"The libelant has never shirked its burden, *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104, . . . 86 L.Ed. 89, 1941 A.M.C. 1697, of affirmatively establishing a case under the contract of private carriage which warranted at least, due diligence to make the vessel seaworthy, and by reflex, from this and the catch-all exculpatory clause so tenderly embraced by shipowner, imposed liability where the stated exception was not made out. The Zesta, 5 Cir., 212 F.2d 137, 1954 A.M.C. 899; The Framlington Court, 5 Cir., 69 F.2d 300, 1934 A.M.C. 272. It reasoned correctly that if the strandings were caused by unseaworthiness due to lack of due diligence, then it was not an excepted 'loss or damage arising or resulting from (1)

navigational error, (2) stranding or (4) latent defect, (6) any other cause without actual fault or privity, The Folmina, 212 U.S. 354 . . . 53 L.Ed. 546; and certainly not if these were merely concurring causes. *Compania de Navigacion La Flecha v. Brauer*, 168 U.S. 104, 118, . . . 42 L.Ed. 398; The Olga S., 5 Cir., 25 F.2d 229, 1928 A.M.C. 831.

"In this task, while ultimate risk of non-persuasion may have been on the cargo, it had the usual advantages of a bailor putting on the carrier, as the person having the means of knowledge, the obligation of coming forward with some explanation, *Commercial Molasses Corp. v. New York Tank Barge Corp.*, supra; The Northern Belle, 9 Wall 526, 76 U.S. 526, 19 L.Ed 746, 748; *Southern Ry. Co. v. Prescott*, 240 U.S. 632 . . . 60 L.Ed. 836, and a presumption of unseaworthiness existing at the beginning of the voyage, where machinery, gear, or appliances fail shortly after the beginning of the voyage without accident, stress of weather, or the like, furnishing an adequate explanation as a likely cause. The Southwark, 191 U.S. 1, . . . 48 L.Ed. 65; The Olancho, D.C.S.D.N.Y., 115 F. Supp. 107, 1953 A.M.C. 1040; The Agwimoon, D.C.Md., 24 F.2d 864, 1928 A.M.C. 645, affirmed 4 Cir., *Atlantic Gulf & West Indies Steamship Lines v. Interocean Oil Company*, 31 F.2d 1006, 1929 A.M.C. 570."

The following comments of the court in *The IONIAN PIONEER*, supra, 236 F2d 78, 83, on the shipowner's failure to exercise due diligence in inspection and repair of the steering machinery have particular application to the instant case:

". . . Was the unseaworthiness caused by the owner's failure to exercise due diligence? On this the only serious concern is whether the shipowner ought to have known of these defects because, save for diligence in obtaining certificates of seaworthiness from Helenic or Lloyds classification societies and which is certainly not the test, see *KNAUTH*, supra, page 187; *Abbazia* (S.D.N.Y.), 127 Fed. 495; *Poleric* (4 Cir.), 1928 A.M.C. 761, 25 F. (2d) 843, cert. den. 278 U.S. 623; *Edgar F. Coney*, (5 Cir.), 1934 A.M.C. 1122, 1129, 72 F. (2d) 490; and a few superficial repairs to parts of the steering apparatus, the last of which for the engine was July 12, 1951, and for the telemotor, January 31, 1950, the *record is completely silent of any serious inspection and survey of the entire steering machinery before this charter party voyage began.*" (Emphasis supplied)

Petitioner's complete failure to show the exercise of due diligence in inspection and care of the vital steering machinery of the SS PENNSYLVANIA corresponds to *The MEANTICUT-BEDFORD*, 65 F Supp 203 (D.C.S.D.N.Y., 1946) 1946 AMC 178, where a collision resulted when the steering gear of the *BEDFORD* jammed. The owner of the *BEDFORD could not establish* the exercise of due diligence by showing *a routine operating test* of the steering gear just before the voyage in question commenced, or by the production of surveyors' certificates, one certificate as to the steering gear and its connections having been issued just three months before the vessel sailed. In holding the owner of the *BEDFORD* liable the court stated, a p 209:

"In addition to the survey by Lloyd's in January, 1940 (referred to above) there is a Lloyd's report dated July 20, 1941, of a survey and another report dated February 28, 1942, of one made on January 7, 1942, in both of which the 'steering gear and its connections' were reported 'Good.' However, MacCorkindale, Lloyd's representative who made the last two surveys, testified that no megger test nor electrical equipment examination was made on either of these surveys. Lloyd's inspections in 1941 and 1942 apparently were not full surveys, for although reports state the steering gear was examined, no electrical equipment was tested. In any event certificates of surveyors and inspectors are to be valued in the light of the actual facts disclosed. *The Doris Kellogg*, 1937 A.M.C. 254, 18 F. Supp. 159.

. . .

"According to the *Bedford's* deck log and the testimony of her Third Officer, a routine operating test of the steering gear was made on the morning of April 9, before sailing from the Bayonne and it was reported 'in good order.' The test consisted of repeatedly turning the wheel and watching the indicator."

As we have pointed out in our opening brief (pages 32 through 39), petitioner has failed to introduce any evidence of inspection and repair of the steering system which even approach the standard of due diligence laid down by the foregoing decisions. The last inspection of the steering system of the vessel was in August, 1951 and this was confined strictly to an ex-

ternal examination of the steering parts and the very "*routine operating test*" held inadequate by the court in *The MEANTICUT-BEDFORD*, supra.

The hydraulic pumps were not opened up and internal parts of the steering system were not inspected in the August, 1951 survey. In fact the record is barren of any evidence that such an examination of the steering system of the SS PENNSYLVANIA was ever made by petitioner. Petitioner would excuse its neglect of this vital equipment by asserting that the proof of its seaworthiness is that it had worked all right in the past (petitioner's brief, p 104).

There is likewise no satisfactory evidence of inspection or test of the emergency or hand steering gear. The August, 1951 survey does not disclose even an operating test of this equipment and as discussed in our opening brief the emergency steering system was found to be jammed by shifting cargo when the vessel was in Portland, Oregon during Voyage 5. Petitioner's Marine Superintendent, Vallet, gave this difficulty his personal attention but took no measures to prevent a subsequent jamming if the cargo should shift again.

In discussing the failure of the steering gear (petitioner's brief, pp 102 through 108), petitioner presents a bizarre interpretation of the radio traffic relating to

the breakdown of this equipment. He quotes the following radiogram:

> "091730Z GMT 51.09 N 141.31 W ENDEAVORING TO STEER COURSE OF 110 DEGREES CANT STEER AT PRESENT TAKING WATER NR ONE HOLD AND ENGINE ROOM."

From the dispatch above quoted, petitioner advances its conclusion that the vessel did, in fact, turn completely around, which has no satisfactory foundation in evidence. In the above quoted dispatch the Master merely reported, in effect, that he would endeavor to steer 110° but in the same dispatch he states without qualification that he could not steer at all. The fact that he could not steer at all is then confirmed categorically by the subsequent radiogram, as follows:

> 1905 GMT TAKING WATER NUMBER ONE HOLD DOWN BY HEAD CAN NOT STEER OR GET FORWARD TO SEE WHERE TROUBLE IS PUMPS HOLDING IN ENGINE ROOM IF WE CAN NOT FIX STEERING GEAR WILL REQUIRE ASSISTANCE VERY HIGH SEAS CAN NOT GET ON DECK AT PRESENT DECK LOAD ADRIFT TAKING TARPAULINS OFF FORWARD HATCHES CAN NOT GET ON DECK TO SECURE MASTER.

The astounding feature in petitioner's treatment of the vessel's steering failure is its assertion (petitioner's brief, p 103) that the "undefined trouble with the steer-

ing gear" was "not very serious". If it wasn't very serious the prevailing weather and sea conditions were certainly not of the violence petitioner represents them to be. The radio messages of the vessel establish without question that the vessel could not steer and that her steering system failed completely during a critical period in the storm. This complete loss of steerageway would have placed the SS PENNSYLVANIA in a very serious situation in any combination of heavy seas and weather. It is also very obvious that any failure or trouble whatsoever with the steering system of a ship during a storm in the North Pacific is of dire consequence. In the case of the SS PENNSYLVANIA the steering failure prevented her from maintaining any steerageway and left her at the mercy of the waves with a Class 1 hull fracture on the port side, with water pouring through her No. 2 hatch and flooding her No. 1 hold, and with cargo drifting about her forward deck.

What was the cause of the failure of the steering system? Petitioner appears quite confused as to the law on this point for it asserts (petitioner's brief, p 108) that cargo claimants must point out the specific unseaworthy feature of this gear. Petitioner forgets that the cargo claimants had no opportunity to inspect this gear and certainly did not govern or control the degree

of examination, repair and replacement which due diligence required of the shipowner under the circumstances. The rule is of course to the contrary, under all authorities reviewed above, and as stated in *The A.H.F. SEEGER*, 104 F2d 167 (2nd Cir., 1939), 1939 AMC 792, the burden is cast upon the shipowner "of showing not only what happened but what was done and what would have been necessary to avert the casualty". This petitioner has not done and if it is content to rely upon the superficial, inadequate inspections which the record in this case discloses, petitioner assumes the responsibility for such defects as may exist and which a diligent examination would reveal. *Warner Sugar Refining Co. v. Munson S. S. Line*, 23 F2d 194 (D.C.S.D.N.Y., 1927).

D. Evidence of the Unseaworthy Condition of the Forward Hatches, the Insecure Carriage and Stowage of Forward Deck Cargo.

The trial court found that deck cargo on the forward deck came adrift, taking off tarpaulins on the forward hatches, and that No. 2 hatch was open and full of water. These events were found to be factors of unseaworthiness contributing to the vessel's loss and the product of the unseaworthy condition of the forward hatches and stowage of cargo on the forward deck.

In our opening brief (pp 50 through 58) we have discussed the evidence demonstrating petitioner's privity in connection with the unseaworthy carriage of cargo on the forward deck and the insecure battening of the forward hatches. We shall now review this evidence as it supports the court's finding that this condition was a factor of unseaworthiness existing at the inception of the voyage which contributed to the loss of the vessel and petitioner's lack of due diligence in respect thereto.

In considering the unseaworthiness of the carriage and stowage of deck cargo on this vessel, the test of seaworthiness laid down by *The SILVIA*, 171 US 462, 43 L ed 241 (1898), must at all times be borne in mind, viz., was the SS PENNSYLVANIA reasonably fit to carry the cargo she undertook to transport? In *The INDIEN*, 5 F Supp 349; affirmed 71 F2d 752 (9th Cir., 1934), this court has recognized that the improper stowage of articles which will imperil the safety of a ship if they come loose, renders a vessel unseaworthy.

We have pointed out in our opening brief that the vessel was carrying a cargo of bulk grain in her lower holds and that such cargo is considered a dangerous cargo requiring the utmost safeguards for security of the hatches. Despite the necessity for extreme precaution in preserving the security of the hatches, petitioner

tendered to the U. S. Army the vessel's entire deck space for carriage of cargo on Voyage 6. On the basis of the space tendered, the Army prestowage plan prepared by Paul C. Maurice, Marine Superintendent for the Seattle Port of Embarkation, provided that a white label cargo of corrosive acid, in 5 gallon glass carboys, was to be stowed one level high in the wings of No. 5 hatch and that a red label cargo of acetylene cylinders should be stowed below deck (Tr 2120-2121; 2128-2134). The acid carboys were placed by the Army for stowage one level high to keep them below the bull rail for support (Tr 2128-2132).

In spite of the Army prestowage plan, the Master intervened during the course of loading and directed that the corrosive acid cargo should be stowed alongside No. 2 hatch (Tr 2686-2687) and that the acetylene cylinders should also be stowed on the forward deck (Tr 991; 1095-1096). The 5 gallon glass carboys of acid were stowed two tiers high by No. 2 hatch (Tr 1004) although the Army prestowage plan provided that these acid carboys should be stowed only one level high in the wings of No. 5 hatch (Tr 2128). The action of the Master in ordering the stowage of white and red label cargo on the forward deck contrary to the Army prestowage plan, was made with the knowledge and acquiescence of petitioner's regularly em-

ployed shore-based supercargo who was in attendance at the loading of the vessel and in charge of the loading for petitioner (Tr 1155-1156). The stowage of the white and red label cargo on the forward deck was made well in advance of the SS PENNSYLVANIA's departure on Voyage 6 and was reported to petitioner's Seattle office by its regularly employed supercargo (Tr 1166-1167).

In addition to the aforementioned acid and acetylene cargo the forward deck of the SS PENNSYLVANIA was loaded with 26 two-wheel trailers (Exh 188), stowed on the starboard side by No. 3 hatch (Tr 1005).

Petitioner seeks to minimize the total weight of the deck cargo carried on the forward deck of the SS PENNSYLVANIA. It is not the weight of the deck cargo which is an important factor in this case. The tragic consequences of the ill advised stowage of any cargo on the forward deck of this vessel, considering the intended route and season, the nature of the deck cargo (acid carboys and acetylene cylinders), with the lower holds filled with bulk grain, is graphically revealed by one of the ship's radiograms:

> ". . . VERY HIGH SEAS CANNOT GET ON DECK AT PRESENT DECK LOAD ADRIFT TAKING TARPAULINS OFF FORWARD HATCHES CANNOT GET ON DECK TO SECURE MASTER."

Petitioner was fully aware that on any voyage in the North Pacific it was a common experience to take heavy seas over the bow and sides of the vessel, with decks continuously awash. Repeated notation of such conditions appears in the logs of the SS PENNSYLVANIA for its Voyages 1 through 5, inclusive (Exhs 40 through 44). In fact, petitioner's Assistant Port Engineer, Mr. Brenneke, testified that he has seen water cataract over the top of the forecastle deck two feet thick (Tr 330).

Petitioner's witness, Captain Brown of the CYGNET III, testified:

> "A You can't send men out on deck when the vessel is shipping heavy seas over the decks.
>
> Q Is that what you mean by the decks being awash?
>
> A Yes." (Tr 1658)

Petitioner's complete awareness of the danger associated with carriage of deck cargo, particularly on a voyage in the North Pacific during the winter time, is emphasized by the following experiences aboard the SS PENNSYLVANIA herself in prior voyages:

> On Voyage 1 a spare propeller stowed on deck was lost overboard in a storm (Tr 159);

On Voyage 2, waves over the bow broke off a reel spring wire which rolled back of No. 2 hatch cutting four tarps on No. 2 hatch about one foot in length through the pontoon. Vallet testified that this was ordinary heavy weather damage which happens on "practically all the voyages" (Tr 189);

On Voyage 4, seas over the starboard after deck tore an acid cargo box adrift, damaging the forward starboard No. 4 boomrest and cargo shifted. Vallet testified that this was an "ordinary routine instance that happens on any transpacific voyage" (Tr 190);

On Voyage 5, decks were awash and the deck load fore and aft shifted. Vallet testified that this was not an "untoward incident" but "just a vessel going through a regular storm which happens practically on all voyages" (Tr 190-191).

Petitioner's witness, Captain Richard A. Johnson, cargo surveyor, testified that it was not at all unusual to take heavy seas, or green seas, over the foredeck stating, "That is certainly to be expected on any ocean-going voyage or any time of the year." (Tr 1217). He also testified that it would be more dangerous for a vessel to sail with a deck load than without a deck load (Tr 1750) and that a drifting deck load is dangerous (Tr 1751).

The unseaworthy stowage of cargo on the forward deck for the intended route and season is enhanced by the testimony of petitioner's witness, Samson Kamel,

concerning the method of securing the label cargo boxes. Mr. Kamel testified:

> "Q Do you anticipate that there will be some working of the cargo and it will be necessary to keep those turnbuckles tightened or to tighten them up? You are nodding your head up and down. I take it you mean to answer, Mr. Kamel?
>
> A Yes, I am sorry.
>
> Q You anticipate, then, when you get everything set up as tight as you can that the turnbuckle will be about—and separated as much as you can so that you can take it up?
>
> A That is right.
>
> Q You assume by that that the seamen will, during the course of the voyage, *at all times* will be able to go forward and to keep the turnbuckles tight? (Emphasis supplied)
>
> A Yes, sir." (Tr 1224-1225)

From Kamel's testimony it is obvious that the very security of the cargo lashings was predicated upon the assumption that the crew *at all times* could go forward on the deck and keep the turnbuckles tight. The absurdity of this assumption is revealed by the events which occurred during the last hours of the SS PENNSYLVANIA.

To climax the unseaworthy conditions prevailing on the forward deck of the SS PENNSYLVANIA at

the inception of Voyage 6, the record affirmatively establishes that the locking bars or cross battens on the forward hatches of the vessel were in a defective condition immediately prior to the time the vessel sailed. (The cross battens are a securing device designed to hold the tarpaulins on the forward hatches). Three members of the vessel's crew who served on Voyage 5 testified, without contradiction on the record, that the cross battens on the forward hatches were bent and buckled in such a manner as to make them difficult to secure and difficult to keep secure at sea. See testimony of Alvin Huston, ship's carpenter (Tr 2081-2082), Richard S. Brooks (Tr 2094) and Royce Cornwell (Tr 2100).

Petitioner can point to no evidence, following the conclusion of Voyage 5 and prior to Voyage 6, that the defective cross battens were ever repaired or replaced by new equipment and there is no evidence that the cross battens were inspected during this period. In a rebuttal effort petitioner refers to testimony of supercargo Allinson, surveyor A. B. Johnson, and "Captain" Sheldrup. However, Allinson did not make an inspection and did not even know whether the hatches were securely battened (Tr 1102-1103). A. B. Johnson could not state that the cross battens were set up tight since that "would just not be my job" (Tr 1208-1209). Mr.

Sheldrup testified that the security of the hatches was not his concern, that he made no inspection of the hatches or hatch covers and was not even sure the tarpaulins were set up tight when he left the ship (Tr 2702).

Based upon the evidence reviewed above concerning the stowage of the forward deck cargo, the insecure lashings and defective cross battens, we have the testimony of Mr. John D. Gilmour an experienced marine surveyor (Tr 2301) corroborated by the testimony of two experienced master mariners, Captain Harry Johnson (Tr 2433-2434) and Captain Ulstad (Tr 2220) that the SS PENNSYLVANIA was not seaworthy when she sailed for Voyage 6 in January across the North Pacific.

We must take exception to the derisive reference by petitioner to the three crew members who served on Voyage 5 and whose testimony brought to light the defective condition of the cross battens on the forward hatches. See the reference on page 119 of petitioner's brief to "a cab driver . . . , a car salesman . . . and an old ship's carpenter." The record shows that Mr. Huston, who was not an elderly man, served honorably with the United States Navy for 16 years and at the time of his honorable discharge was a chief carpenter. As to the other seamen, Brooks and Cornwell, petitioner is aware that seamen have various occupa-

tions when not serving at sea. While serving aboard the SS PENNSYLVANIA on Voyage 5, these particular men were duly certified by the U. S. Coast Guard as competent to perform their duties and under such certification were employed by petitioner. Furthermore, as members of the crew these seamen actually worked with the storm battens throughout Voyage 5 and experienced the problems and difficulties to which they testified. The definite relevance of their testimony in this respect lies in the complete absence of any evidence that the defective cross battens were repaired, replaced or even inspected following the conclusion of Voyage 5 and the inception of Voyage 6.

The record in this case abundantly supports the findings of the trial court as to the unseaworthy condition of the forward hatches and the unseaworthy stowage of deck cargo for the Great Circle Route in the North Pacific during January.

This phase of the unseaworthiness of the SS PENNSYLVANIA is particularly outlined by the decision of the Second Circuit in *The WEST KEBAR*, 147 F2d 363 (2nd Cir., 1945), 1945 AMC 191, which involved the unseaworthy stowage of certain deck cargo, including empty ammonia cylinders. The ammonia cylinders, stowed on the after deck of the vessel, broke loose in a "whole gale" in the Atlantic with seas over the deck.

The drifting ammonia cylinders broke off a number of "kick tubes" which created openings in the deck through which sea water entered into No. 4 and No. 5 holds, damaging cargo. In holding that the vessel was unseaworthy as to her deck cargo, in view of the intended voyage, season and route, and in denying the defense of a peril of the sea, Judge Learned Hand stated at pp. 365-366:

> "The first question is whether the ship was unseaworthy. Arguendo, we will assume that the 'kick tubes' did not make her so if she had carried no deck cargo; and, perhaps also, even when she carried certain kinds of deck cargo. Indeed, we might go still further, and assume that she was seaworthy, just as she rode, for a summer voyage, for example in the Mediterranean. But she was to cross the Atlantic in January, ending in latitudes over 40°; and the question is whether, with the deck cargo she actually did carry and the 'kick tubes' in her deck, she was reasonably fitted for such a voyage. The Silvia, 171 U.S. 462, 464; The Southwark, 191 U.S. 1, 9; Societa Anonima, etc. v. Federal Insurance Co., 1933 A.M.C. 323, 62 F. (2d) 769, 771 (2CCA); The Smyrna, 1933 A.M.C. 231, 63 F. (2d) 1048, 1050 (4CCA); The J. L. Luckenbach, 1933 A.M.C. 980, 65 F. (2d) 570, 572 (2CCA); The Galileo, 1932 A.M.C. 1, 54 F. (2d) 913, 914 (2CCA). The fact that the 'kick tubes' had caused no trouble in the past was relevant, but far from conclusive; it took only a minimum of foresight to perceive that they would stand up against very little violence. True, as they were placed on the deck, they were out of the way; set either close to the bulkhead, alongside the hatch coamings, or around the mast. It would take a direct hit to break

them off; but it would not take a heavy hit, and each one, if broken would open a hole over an inch in diameter directly into the 'tween deck. An ammonia cylinder, weighing 200 pounds, free to plunge about on an open deck in a heavy seaway, was an engine before which such a fragile obstacle was no better than an eggshell. *The safety of the cargo stowed below deck* was, therefore absolutely dependent upon the continued solidity of the pack; and, in the way the cylinders were made fast, that solidity depended upon each one's keeping its position in the pyramidal stack. As soon as one slipped out from between its fellows, the hold of the rest upon each other was lost, and all would inevitably escape. There were the nets, to be sure, but these did not go clear to the deck, and could not be expected to hold if they had, once the pack broke up. (Emphasis supplied)

. . .

"*The consequences of any such break being so great, the least care that could be demanded was that the cylinders should be made fast against all but the most unexpected and 'catastrophic' storms; and such care the ship did not in fact bestow as the* event proved. (Emphasis supplied)

. . .

"The case comes down to whether a ship proves that she is well found for a winter Atlantic voyage, when her stow breaks apart under such conditions. We do not see how less can be asked of her upon such a voyage, than that she shall successfully meet such weather, for surely gales—indeed even 'whole gales'—are to be expected in such waters at such a season. We cannot therefore agree that 'the damage to the cargo in the shelter or bridge decks, and the No. 5 'tween-deck and No. 5 lower hold was due to perils of the sea,' as the judge found. On the contrary, we are forced to conclude that the

West Kebar is liable for entry of all sea water that she shipped on the after well deck."

III

Petitioner's Defense of Latent Defects.

In the petition for exoneration from or limitation of liability, by which this proceeding was commenced, no assertion or allegation is made that the vessel was lost by reason of latent defects. Nothing relating to the subject of latent defects appears in the findings of fact and conclusions of law which are before this Court on this appeal.

For the first time in this entire proceeding, and apparently in a desperate effort to seek some statutory defense of liability, petitioner asserts the doctrine of latent defect. Petitioner did not assert this defense at the time of trial and the record contains absolutely no evidence on the subject of a latent defect. Nevertheless, petitioner now suggests that a latent defect was responsible for the hull failures (petitioner's brief, pp 124-129) and the failure of the steering gear on Voyage 6 (petitioner's brief, p 137). At the same time, petitioner states that it doesn't know what these latent defects were, and again vaguely attributes the failures to the storm.

The authorities on the subject of latent defects decisively eliminate this statutory defense to liability in the instant case. The defense of latent defects, and a shipowner's burden in respect thereto, is given thorough consideration by the Fifth Circuit in *Waterman S. S. Corp. v. United States S. R. & M. Co.*, 155 F2d 687, 691 (5th Cir., 1946), where the deck cargo on a vessel came adrift when two "pelican hooks", which secured chain lashings, bent in such a fashion as to release the lashings. The Carriage of Goods By Sea Act of 1936 was involved and the shipowner urged that a latent defect existed in the pelican hooks, although it was unable to produce the hooks in evidence for examination by a competent witness. In denying the defense of latent defect the following comments of the court are particularly applicable to the instant case:

> "Upon the carrier is placed the burden of going forward to show a peril of the sea or a latent defect; it also has the risk of non-persuasion.
>
> " '. . . The reason for the rule is apparent. He is a bailee intrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain

or, explaining, bring within the exceptional case in which he is relieved from liability . . .'

"A true latent defect is a flaw in the metal and is not caused by the use of the metallic object. 'A latent defect is one that could not be discovered by any known and customary test.'

. . .

"The record discloses no evidence on the subject of a latent defect. The carrier merely argues, 'A reasonable explanation of the cause of the straightening out of the pelican hooks is that a latent defect existed in them.'

. . .

"The carrier did not introduce the pelican hooks into evidence. The carrier offers as its excuse for this failure that the Government requisitioned the ship before the shipper brought this suit. Since this is a plausible excuse for not producing the hooks in court, the court will not draw the inference that an examination of the hooks would show a latent defect. The consequences of its inability to produce the hooks in court, however, must fall upon the carrier, for without the hooks and without testimony by a competent witness on the latent defect the carrier cannot satisfy its burden of proving the existence of latent defects.

. . .

"Where it is doubtful whether either a latent defect or a peril of the sea exists, even in the absence of proof of any negligence, the carrier has not carried its burden of proof."

It will be recalled that in *The MEANTICUT-BEDFORD*, 65 F Supp 203 (D.C.S.D.N.Y., 1946), 1946 AMC

178, the shipowner raised the defense of latent defects to excuse the failure of the vessel's steering system. The shipowner could not show the precise cause of the failure and in rejecting this defense the court stated, at p 206:

> "The real issue is presented by Bedford's defense of inevitable accident—a latent defect. Relying on this defense the claimant must prove it if it is to be relieved of liability. The claimant must either point out the precise cause and show that it was in no way negligent, or must show all possible causes, and that it is not at fault in connection with any one of them. In *re Reichert Towing Line*, 2 Cir., 251 F 214, certiorari denied 248 U.S. 565, 39 S.Ct. 9, 63 L.Ed. 424; *The Moran, D. C.*, 12 F. Supp. 493."

The rule was recognized by this court in *The FELTRE*, 30 F2d 62 (9th Cir., 1929), where the court stated at p 64:

> "The only suggestion of latent defects is found in . . . conjectures . . . conjectures will not be permitted to take the place of proof."

See also: *The FOLMINA*, 212 US 354, 53 L ed 546 (1909);

The IONIAN PIONEER, 236 F2d 78 (5th Cir., 1956) 1956 AMC 1750.

In the instant case, the SS PENNSYLVANIA has been lost and it is clear that petitioner cannot establish

the actual condition of any of the parts of the ship which are known to have failed. In fact, petitioner admits that it does not know what went wrong (petitioner's brief, pp 109; 136).

Furthermore, as the trial court has held, petitioner has not satisfied its burden of proving due diligence in inspection and repair of the parts which failed. Under the circumstances, any defense of latent defect is mere conjecture and must be resolved against petitioner.

IV

Petitioner's Defense of Error in Navigation.

We cannot overlook petitioner's suggestion on page 82 of its brief that an error in navigation may be available to it as a statutory exception to liability. Here again petitioner raises a defense which was not pleaded in the petition and no evidence whatsoever was introduced on this point.

In its conjecture that the SS PENNSYLVANIA turned around in the storm, petitioner intimates that the act of turning around was "an act, neglect or default of the Master . . . in the navigation or management of the ship." It is then vaguely implied by petitioner that the act of turning around may in some way be associated with the breakdowns and failures sustained by the

SS PENNSYLVANIA which caused her loss. We know, of course, that the vessel suffered her Class 1 hull fracture on the port side before the Master even indicated that he had in mind turning around. However, the real weakness in petitioner's assertion lies in the fact that there is no satisfactory evidence that the ship turned around or that if she had turned around, or endeavored to turn around, it would have been an error in navigation or an act of the Master associated with any of the failures and breakdowns which caused her loss. Moreover, we do know that other ships in the immediate storm area did turn around and participate in the rescue-search operations through the full period of the storm without sustaining any serious damage.

The authorities we have previously cited readily dispose of the above defense.

V

The Privity of Petitioner in the Failure to Exercise Due Diligence is Clearly Demonstrated and Proved by the Testimony of Record.

The trial court has not only found that petitioner failed to produce evidence that it used due diligence to make the vessel seaworthy, but that the petitioner did not in fact use such due diligence. See Finding No. VI.

It must at all times be borne in mind that petitioner's duty to exercise due diligence is not delegable. As stated

in *The OLANCHO*, 115 F Supp 107 (D.C.S.D.N.Y., 1953) at p 115:

"The duty imposed on a ship owner to exercise due diligence to make his vessel seaworthy before the vessel breaks ground is non-delegable. If the surveyors or the employees in the shipyard failed to exercise due diligence the shipowner is chargeable therewith. *Navigazione Libera Triestina v. Garcia & Maggini Co.*, 9 Cir., 30 F.2d 62 at page 64. The shipowner has the burden of proving under the Carriage of Goods by Sea Act, that he has performed that duty. T. 46 U.S.C.A. § 1304(1). What constitutes due diligence depends upon the facts and circumstances of the particular case."

See also:

The IONIAN PIONEER, 236 F2d 78 (5th Cir., 1956), 1956 AMC 1750, at p 84:

"The failure on the part of any of the owner's servants, which includes the ship's Master, to take the prudent steps satisfying the non-delegable standard of due diligence is chargeable to it for, 'a shipowner does not exercise due diligence . . . by merely furnishing proper structure and equipment, for the diligence required is diligence to make the ship *in all respects* seaworthy; and that . . . means due diligence on the part of all the owner's servants in the use of the equipment, *before the commencement of the voyage and until it is actually commenced*.' International Navigiation Co. v. Farr & Bailey Mfg. Co., 181 U.S. 218, 225, 21 S.Ct. 591, 593, 45 L. Ed. 830, 833. 'In other words, the owners must show that

those whom they employ to act actually used due diligence'." (Emphasis supplied)

The diligence required is diligence with respect to the vessel itself and not in obtaining certificates.

See:

The OTHO, 49 F Supp 945 (D.C.S.D.N.Y., 1943), affirmed 139 F2d 748 (2nd Cir., 1944);

The FELTRE, 30 F2d 62 (9th Cir., 1929);

The NINFA, 156 F 512 (D.C.D.Ore., 1907);

Artemis Maritime Co., Inc. et al v. Southwestern Sugar & Molasses Co., 189 F2d 488 (4th Cir., 1951).

It is also well established that a superficial or visual inspection does not satisfy the requirements of due diligence as stated in *Union Carbide & Carbon Corp. v. The WALTER RALEIGH et al*, 109 F Supp 781 at p 793 (D.C.S.D.N.Y., 1951):

> "The carrier does not show due diligence in the inspection to ascertain the vessel's seaworthiness, unless the inspection is something more than visual. . . . Valves should be tested under pressure, not just looked at when not under pressure."

See also:

Ore Steamship Corporation v. DS/AS HASSEL, 137 F2d 326, at p 329, (2nd Cir., 1943):

"A mere superficial inspection of a ship is insufficient to establish an exercise of due diligence on the part of the owner to make her seaworthy."

The VIZCAYA, 63 F Supp 898, at p 904 (D.C.E.D. Pa., 1945):

"As to the exercise of due diligence, the only evidence is that the chief engineer 'inspected' the machinery and found everything fit. But this is insufficient, for I feel that information as to the care and extent of the inspection is of vital importance. Thus, it has been held that a visual inspection is 'inadequate' . . . In any event, if there is any doubt as to the unseaworthiness of the vessel, that doubt must be resolved against the shipowner."

Warner Sugar Refining Co. v. Munson S. S. Line, 23 F2d 194, at p 197, (D.C.S.D.N.Y., 1927):

"If a vessel owner is satisfied to rely on external appearances that the vessel and her appliances are in such good order that it is safe to take cargo on board, instead of making fair examinations and tests, the vessel owner assumes the responsibility for such defects as may exist and which a diligent examination would reveal."

The standard imposed upon the carrier is the exercise of due diligence in inspection prior to and with respect to the voyage in question, as distinguished from prior inspections and surveys. This rule was emphasized

in *Union Carbide & Carbon Corp. v. The WALTER RALEIGH et al*, 109 F Supp 781 (D.C.S.D.N.Y., 1951) where the court stated at p 792:

> "The rule as to inspections requires that the inspection be made before the vessel breaks ground. Seaworthiness of a part of the ship's equipment on the voyage just ended is not sufficient. Some thing might happen to the equipment while the vessel is in port. It may be because of this possibility that a proper inspection is supposed to be made prior to commencement of each voyage."

The burden of the carrier to prove the exercise of due diligence is such that it is not carried if the issue is left in doubt.

See:

The INDIEN, 5 F Supp 349; affirmed 71 F2d 752 (9th Cir., 1934);

Artemis Maritime Co., Inc. et al v. Southwestern Sugar & Molasses Co., 189 F2d 488 (4th Cir., 1951).

Standard Oil Co. (N.J.) v. Anglo-Mexican Petroleum Corp., 112 F Supp 630 (D.C.S.D.N.Y., 1953);

Commercial Molasses Corporation v. New York Tank Barge Corporation, 314 US 104, 86 L ed 89 (1941);

The W. H. DAVIS, 56 F Supp 564 (D.C.S.D.N.Y., 1944), at p 567:

> "The burden of proof of seaworthiness rests upon the shipowner who is a common carrier not because

he is an ordinary bailee but because he is a special type of bailee who has assumed the obligation of an insurer. The burden rests upon him to show that the loss was due to an excepted cause which the law itself annexes to his undertaking and that he has exercised due care to avoid it.

"Such a carrier can only relieve himself of liability by proof of certain permitted exceptions and not to his breach of duty to furnish a seaworthy vessel. In that case since the burden is on the shipowner, he does not sustain it, and the shipper must prevail if, upon the whole evidence, it remains doubtful whether the loss is within the exception."

In our opening brief, we have pointed out the complete lack of evidence sustaining petitioner's burden to prove that it was not in privity with the unseaworthiness of the SS PENNSYLVANIA at the inception of Voyage 6, as well as the evidence supporting the trial court's finding that petitioner failed to exercise due diligence. In our opening brief we have also dealt at length with the evidence establishing that the very failure to exercise due diligence, as found by the trial court, was the personal neglect and default of petitioner's Marine Superintendent, Vallet, his Assistant Port Engineer and other supervisory personnel of petitioner who were invested with high responsibility in the company's management and operations. In fact, most of the failures to exercise due diligence were the result of the Marine Superintendent's personal neglect, default and indifference. It is well established that

under these circumstances the corporate shipowner is not entitled to limitation of liability. This rule has been recognized by the United States Supreme Court in *Coryell v. Phipps*, 317 US 406, 87 L ed 363, 1943 AMC 18, where the court stated with regard to corporate shipowners at 87 L ed 367:

> "In those cases it is held that liability may not be limited under the statute where the negligence is that *of an executive officer, manager or superintendent* whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred. Spencer Kellogg & Sons v. Hicks, 285 US 502, 76 L ed 903, 52 S Ct 450, and cases cited; 3 Benedict, Admiralty, 6th ed § 490." (Emphasis supplied)

See also *The POCONE*, 159 F2d 661 (2nd Cir., 1947), 1947 AMC 306, where a subordinate traffic manager had been delegated the duty of the general agent in supervision of the condition of the company ships and repairs they might need. His neglect was held to be the neglect of the corporation which defeated limitation of liability; *The CLEVECO*, 59 F Supp 71 (D.C.N.D. Ohio E.D., 1944), affirmed 154 F2d 605 (6th Cir., 1946).

The evidence in this record establishes that the failure to exercise due diligence was the neglect of petitioner's Marine Superintendent and other supervisory personnel, "whose scope of authority included supervi-

sion over the phase of the business out of which the loss . . . occurred." *Coryell v. Phipps*, supra. It is therefore abundantly clear that the trial court erred in finding and concluding that petitioner is entitled to limitation of liability. Moreover, as in the case of the exercise of due diligence, the decided burden of proving lack of privity or knowledge was upon the petitioning shipowner. It is not the responsibility of these cargo claimants to prove knowledge or means of knowledge on the part of the shipowner. See *The SILVER PALM*, 94 F2d 776 (9th Cir., 1937), 1937 AMC 1462; *The CLEVECO*, supra.

We have pointed out in our opening brief at pages 20 through 24 that petitioner at trial did not even undertake to sustain its burden of proof upon the issue of privity but rather relied upon an asserted lack of liability. The record is, accordingly, barren of any satisfactory evidence supporting petitioner's lack of privity and the trial court clearly erred in holding that petitioner has sustained its burden of proof in this regard.

It is significant that petitioner has practically ignored the extensive testimony of its first and principal witness, Marine Superintendent Lester E. Vallet (Tr 138-316), as well as that of its Assistant Port Engineer, Harve R. Brenneke. Only casual, infrequent and brief mention is made of the testimony of these two witnesses

in petitioner's opening brief. The reason is manifest, for the testimony of these two witnesses alone served to highlight their own omissions and neglect, the petitioner's lack of due diligence and accordingly defeat petitioner's right to limitation of liability.

CONCLUSION

In the concluding portions of its brief, petitioner refers to a background, in the enactment of the Carriage of Goods by Sea Act of 1936, of public policy in encouraging shipbuilding interests in the development and maintenance of a merchant marine. Petitioner therefore suggests (petitioner's brief, p 139) that in the instant case it should receive a liberal construction of the statute, which it asserts "replaced" the "old" Harter Act, 46 USCA, § 190, et seq.

This court is aware, and petitioner should be aware, of the fact that the Harter Act of 1893 is still in existence. In the most recent edition of Knauth on Ocean Bills of Lading—the American and Canadian Law (4th Ed. 1953), it was stated at p 163:

> "The Harter Act of 1893 has *not been repealed nor amended* . . . It continues in full force and effect, as heretofore in all relations except the two following:
>
> 1. Foreign commerce in cargo (other than livestock) carried under deck from tackle to tackle;

2. Domestic commerce at the option of the carrier provided the bill of lading contains an express statement that it shall be subject to the Act of 1936."

Each statute in the field of its application provides statutory modification of the very strict common law rule as to the liability of a common carrier, and as stated by the United States Supreme Court in *Commercial Molasses Corporation v. New York Tank Barge Corporation*, 314 US 104, 109, 86 L ed 89, 94 (1941):

> "One who has assumed the obligation of a common carrier can relieve himself of liability for failing to carry safely only by showing that the cause of the loss was within one of the *narrowly restricted* exceptions which the law annexes to his undertaking, or for which it permits him to stipulate." (Emphasis supplied)

This rule in Admiralty requiring strict construction of statutory exceptions to liability was explained by Judge Learned Hand as follows:

> ". . . the warranty of seaworthiness is a favorite of the admiralty and exceptions to it or limitations upon it, are narrowly scrutinized." *Metropolitan Coal Co. v. Howard*, 155 F2d 780, at p 783-784, (2nd Cir., 1946).

We submit that under the United States Carriage of Goods by Sea Act and its Canadian counterpart the rec-

ord in this proceeding presents abundant support for the findings of the trial court under which the petition for exoneration of liability was denied.

We further submit, however, that the same findings necessitated a further finding by the trial court that the unseaworthy condition of the SS PENNSYLVANIA at the inception of Voyage 6 was within the privity and knowledge of the petitioner and a conclusion that the petition for limitation of liability should likewise be denied.

The position of the parties in this case is eloquently expressed by the language of this court in a 1931 decision dealing with a similar question:

> "From ancient times the men who have had to go down to the sea in ships have held themselves to high accountability for care in making their craft fit to cope with the capricious elements. Though, as we have seen, the shipowner's liability has been limited by statute, such limitation in his favor is to be strictly construed against him, if he fails to prove his own diligence in making the vessel seaworthy." *Rideout No. 7*, 53 F2d 322, at p 326, (9th Cir., 1931), 1931 AMC 1870, 1877.

Because of the clear evidence showing privity and knowledge of the petitioner in the unseaworthiness of the SS PENNSYLVANIA at the inception of Voyage 6, we submit that the Interlocutory Decree of the trial

court, as it grants the petition for limitation of liability, should be reversed and that a Decree should be entered against petitioner in favor of these cargo claimants for the full amount of their losses, without limitation as to petitioner's liability.

Respectfully submitted,

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